**JUDICIAL COUNCIL OF CALIFORNIA**
**ADMINISTRATIVE OFFICE OF THE COURTS**
455 Golden Gate Avenue
San Francisco, California 94102-3688

## Report Summary

TO: Members of the Judicial Council

FROM: Policy Coordination and Liaison Committee
Hon. Marvin R. Baxter, Chair
Civil and Small Claims Advisory Committee
Hon. Lee Smalley Edmon, Chair
Court Technology Advisory Committee
Hon. Ming W. Chin, Chair
Patrick O'Donnell, Supervising Attorney, 415-865-7665,
patrick.o'donnell@jud.ca.gov

DATE: April 16, 2008

SUBJECT: Electronic Discovery: Proposed Legislation (amend Code Civ. Proc., §§ 2016.020, 2031.010–2031.060, 2031.210–2031.280, and 2031.290–2031.320; add Code Civ. Proc., §§ 1985.8 and 2031.285)(Action Required)

Issue Statement
The discovery of electronically stored information is an important feature of civil discovery because a significant amount of all information is currently stored in electronic form. However, California discovery law currently does not expressly address issues relating to the discovery of electronically stored information. To modernize the civil discovery law and improve the procedures for handling the discovery of electronically stored information, the Judicial Council should sponsor legislation to amend California's Civil Discovery Act.

Recommendation
The Judicial Council's Policy Coordination and Liaison Committee, the Civil and Small Claims Advisory Committee, and the Court Technology Advisory Committee recommend that the Judicial Council sponsor legislation in 2008 to amend the Code of Civil Procedure to expressly address issues relating to the discovery of electronically stored information.[1]

[1] This legislative proposal was developed by the Discovery Subcommittee of the Civil and Small Claims Advisory Committee, working closely with members of attorney organizations. The subcommittee is chaired by Hon. Andrew P. Banks. In addition to Judge Banks, the participants in the meetings that developed this proposal included Hon. Lee Smalley Edmon (Chair, Civil and Small Claims Advisory Committee), Ms. Catherine Valerio Barrad, Mr.

The text of the proposed legislation is attached to the report at pages 16–31.[2]

Rationale for Recommendation

The transformation of information from primarily being in the form of paper documents to primarily being stored electronically has significantly affected the civil discovery process. Today most information is in digital rather than paper form. Information is created, stored, and used with computer technology, such as word processing, databases, and spreadsheets. Information may also be created, stored, and used in devices attached to or peripheral to computers, such as printers, fax machines, and pagers; in Internet applications, such as e-mail and the World Wide Web; in electronic devices, such as cell phones; and in media used to store computer data, such as disks, tapes, and CDs.[3]

In response to the development of electronically stored information, the federal and state courts have been taking actions to modernize the discovery process. In addition, the Conference of Chief Justices has approved guidelines on electronic discovery. The *ABA Civil Discovery Standards* have been revised to take electronic discovery into account. And the National Conference of Commissioners on Uniform State Laws (NCCUSL) has developed *Uniform Rules Relating to Discovery of Electronically Stored Information ("Uniform Rules").*

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

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Thomas J. Brandi, Hon. Steven A. Brick, Mr. Christopher G. Costin, Mr. Don Ernst, Mr. Peter Glaessner, Hon. Harold W. Hopp, Hon. Curtis E.A.Karnow, Mr. Paul R. Kiesel, Prof. Glenn S. Koppel, Mr. Wayne H. Maire, Mr. Christopher B. Marshall, Ms. Debra K. Meyers, Hon. Henry E. Needham, Hon. William D. Palmer, Hon. Peter J. Polos, Hon. Andria K. Richey (ret.), Hon. Frank Roesch, Mr. Steven Williams, and Mr. Walter M. Yoka. Staff of the committee and attorney organizations participating in the meetings included Mr. Patrick O'Donnell, Mr. Daniel Pone, Ms. Anne M. Ronan, Mr. Saul Bercovitch, Mr. Michael Belote, and Ms. Lee-Ann Tratten. The subcommittee's proposal was reviewed and approved by the Civil and Small Claims Advisory Committee in March 2008. In this report and the accompanying comment chart, the term "committee" refers to the Civil and Small Claims Advisory Committee.

[2] The committee also developed a companion proposal to amend rules 3.724 and 3.728 of the California Rules of Court on civil case management to ensure that issues relating to the discovery of electronically stored information are addressed by the parties and the court early in the course of litigation. If the proposed legislation is introduced this year, the rules proposal will be submitted to the Judicial Council in the fall of 2008, with the objective that it become effective at the same time as the legislation, January 1, 2009.

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

The proposals presented in this report seek to improve the practices and procedures for handling the discovery of electronically stored information by introducing legislation to amend the Code of Civil Procedure to include new e-discovery provisions that will be integrated into the framework of California's civil discovery law.

*The Proposed E-Discovery Legislation*
In California, the law relating to civil discovery is primarily located in the Civil Discovery Act (Code Civ. Proc., §§ 2016.010 et seq.). This proposal would modernize the Code of Civil Procedure to reflect the growing importance of discovery of electronically stored information. Specifically, the proposal would amend the code to include new provisions relating to electronic discovery and would add two new sections relating to electronic discovery to the code. These statutory changes would incorporate many of the provisions of the *Uniform Rules* into the code.

The main features of the proposed legislation are discussed under the following headings in the report:

1. *Definitions (Code Civ. Proc., § 2016.020)*
See report pages 3–4 (discussion) and page 16 (text).

2. *Scope of Discovery (Code Civ. Proc., § 2031.010*
See report page 4 (discussion) and pages 16–29 (text).

3. *Timing of Discovery (Code Civ. Proc., §2031.020)*
See report, page 4 (discussion) and page 17 (text).

4. *Form of Discovery (Code Civ. Proc., § 2031.030)*
See report, pages 4–5 (discussion) and pages 17–18 (text).

*5. Protective Orders (Code Civ. Proc., § 2031.060)*
See report, pages 5–6 (discussion) and pages 19–21 (text).

*6. Responses* (*Code Civ. Proc., § 2031.280)*
See report, page 6 (discussion) and pages 24–25 (text).

*7. Claims of Privilege or Work Product Protection (Code Civ. Proc., § 2031.285)*
See report, page 7 (discussion) and page 25 (text).

*8. Motions to Compel (Code Civ. Proc., § 2031.310)*
See report, page 7–8 (discussion) and pages 27–28 (text).

*9. "Safe Harbor" Provisions (Code Civ. Proc., §§ 2031.060, 2031.300, 2031.310, 2031.320, and 1985.8))*

See report, page 8 (discussion) and pages 21, 26, 28, 29, and 31 (text).

*10. Subpoena Requiring Production of Electronically Stored Information (Code Civ. Proc., § 1985.8)*
See report, pages 8–9 (discussion) and pages 29–31 (text).

Alternatives Considered
The committee considered the alternative of proposing no new legislation relating to the discovery of electronically stored information and leaving the law unchanged. It concluded that there are compelling reasons to modernize the Code of Civil Procedure at this time to address the discovery of electronically stored information. Most information today is created and maintained in electronic form. Discovery disputes increasingly involve such information. As recent cases involving electronic discovery issues demonstrate, practitioners would benefit from having more guidance and improved procedures in this important area of the law.

Comments From Interested Parties
There was substantial public interest in this proposal. Nearly fifty comments were received. The commentators included attorney organizations, business associations, corporations, judges, courts, law firms, and individual attorneys. While there was substantial support for the proposal, many commentators suggested specific modifications. Also, some opposed the proposal, preferring the provisions of the federal rules on electronic discovery or no changes to the discovery law.[4]

Support for the proposal came from a wide variety of sources. For instance, California Defense Counsel submitted a comment "express[ing] strong agreement with proposed changes in statewide Rules of Court and statutes relating to electronic discovery." (General Comments, comment 6, pages 33–34.) Similarly, Consumers Attorney of California stated that its organization "strongly supports the proposed changes." (General Comments, comment 10, page 40.)

The main concern among those who were critical of the proposal was that it differs from the approach adopted in the recently adopted federal rules relating to the discovery of electronically stored information. The committee carefully considered all the comments on this subject. It concluded that the proposed legislation is actually quite similar to the new federal rules on the discovery of electronically stored information; the legislation adapts those rules so that the provisions relating to the discovery of such information are fully integrated into California's discovery statutes. Also, even though the proposed legislation differs in some respects from the federal rules, it provides a

[4] The report discusses the comments at pages 9–14. Also, a detailed chart summarizing all the comments and the committee's responses is attached to the report at pages 32–179. The chart is divided into General Comments (report, pages 32–74) and Specific Comments (report, pages 75–179).

better approach to resolving issues relating to the discovery of electronically stored information in California. The proposed approach is fair, balanced, and efficient.

Lastly, some commentators expressed a concern that the proposed legislation would require the party from whom discovery of electronically stored information is sought to bring a motion for a protective order in every case. This is not the intent of the legislation nor will it be its effect. The usual California discovery procedures will apply to electronic discovery, including the ability of the party demanding the production of electronically stored information to file a motion to compel; hence, the resolution of disputes over the discovery of electronically information will not always require the filing of motion for protective orders. To clarify this matter, Code of Civil Procedure section 2031.310 has been modified to include provisions parallel to those in section 2031.060 on motions for protective orders relating to the production of electronically stored information that are from sources that are not reasonably accessible.

Implementation Requirements and Costs

The proposal will principally affect parties and their attorneys involved in the discovery of electronically stored information. There may be some implementation requirements and costs affecting the courts—such as, for example, providing bench books and education for judges on the new legislation. Overall, the effect of the proposed legislation should be to significantly improve the procedures for the handling of the discovery of electronically stored information in civil cases.

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## Issue Statement

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## Recommendation

The Judicial Council's Policy Coordination and Liaison Committee, the Civil and Small Claims Advisory Committee, and the Court Technology Advisory Committee recommend that the Judicial Council sponsor legislation in 2008 to amend the Code of Civil Procedure to expressly address issues relating to the discovery of electronically stored information.[1]

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The text of the proposed legislation is attached at pages 16–31.[2]

Rationale for Recommendation

*Importance of Electronic Discovery*
The transformation of information from primarily being in the form of paper documents to primarily being stored electronically has significantly affected the civil discovery process. Today most information is in digital rather than paper form. Information is created, stored, and used with computer technology, such as word processing, databases, and spreadsheets. Information may also be created, stored, and used in devices attached to or peripheral to computers, such as printers, fax machines, and pagers; in Internet applications, such as e-mail and the World Wide Web; in electronic devices, such as cell phones; and in media used to store computer data, such as disks, tapes, and CDs.

The change from paper to electronically stored information has affected discovery in many ways. The volume and number of locations of electronically stored documents is much greater than for conventional paper documents. There may be hundreds of copies or versions of a single document located in various locations in a computer network or on servers.

There are also significant differences in kind between paper documents and documents in electronic form. For instance, once paper documents are destroyed, they are permanently lost; however, "deleted" data generally can be retrieved and so may be discoverable. In addition, the advent of electronically stored information affects the costs of discovery. The large volume of electronically stored information sometimes can significantly increase the amount of time and the cost of searching for information. But when electronic discovery is properly managed, it also can greatly reduce the cost of discovery.[3]

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[2] The committee also developed a companion proposal to amend rules 3.724 and 3.728 of the California Rules of Court on civil case management to ensure that issues relating to the discovery of electronically stored information are addressed by the parties and the court early in the course of litigation. If the proposed legislation is introduced this year, the rules proposal will be submitted to the Judicial Council in the fall of 2008, with the objective that it become effective at the same time as the legislation, January 1, 2009.

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

In response to the development of electronically stored information, the federal and state courts have been taking actions to modernize the discovery process. The Federal Rules of Civil Procedure were revised to include electronic discovery provisions, effective December 1, 2006. Some states have recently amended their discovery statutes or rules to include provisions relating to electronic discovery.[4]

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

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

In sum, the proposals presented in this report seek to improve the practices and procedures for handling the discovery of electronically stored information by introducing legislation to amend the Code of Civil Procedure to include new e-discovery provisions that will be integrated into the framework of California's civil discovery law.

*The Proposed E-Discovery Legislation*

In California, the law relating to civil discovery is primarily located in the Civil Discovery Act (Code Civ. Proc., §§ 2016.010 et seq.). This proposal would modernize the Code of Civil Procedure to reflect the growing importance of discovery of electronically stored information. Specifically, the proposal would amend the code to include new provisions relating to electronic discovery and would add two new sections relating to electronic discovery to the code. These statutory changes would incorporate many of the provisions of the *Uniform Rules* into the code. A summary of the main features of the proposed legislation follows.

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

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

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

optical, electromagnetic, or similar capabilities."[5] New subdivision (e) would define "electronically stored information" as "information that is stored in an electronic medium."[6]

2. *Scope of Discovery (Code Civ. Proc., § 2031.010)*
Code of Civil Procedure section 2031.010 on the scope of discovery would be amended to expressly state that a party may obtain discovery of "electronically stored information." This section and many others in the Civil Discovery Act would also be amended to state that parties may undertake discovery not only by "inspecting," but also by "copying, testing, or sampling." The addition of "copying, testing, and sampling" would make the rules consistent with the federal and NCCUSL rules that include these methods of discovery.[7]

3. *Timing of Discovery (Code Civ. Proc., § 2031.020)*
In developing this proposal, the committee considered whether to recommend a different timeframe for conducting the discovery of electronically stored information than is provided for other discovery under section 2031.020, but rejected this alternative. The committee concluded that the same timeframes that are used for civil discovery in general should apply to electronic discovery. As under existing law, parties would have the ability to stipulate to different times.[8]

4. *Form of Discovery (Code Civ. Proc., § 2031.030)*
An important issue that has arisen with the discovery of electronically stored information concerns the form in which the information must be produced. The Civil Discovery Act would be amended to address this issue. Specifically, section 2031.030 of the Code of Civil Procedure would be amended to include a provision that "a party demanding inspection, copying, testing, or sampling of electronically stored information may specify

[5] This definition is from NCCUSL, *Uniform Rules*, Rule 1 (Definitions), subpart (2).
[6] This definition is based on NCCUSL, *Uniform Rules*, Rule 1 (Definitions), subpart (3); however, the words "and is retrievable in perceivable form" have been omitted from the definition because the additional clause would unduly restrict the types of electronically stored information that are discoverable and lead to unnecessary disputes over the scope of production.
[7] In recommending the addition of this new language, the committee concurs with the statement contained in the Advisory Committee Note to the 2006 Amendment to Federal Rule of Civil Procedure 34(a). That note states that the new language affords an opportunity for parties to test or sample materials sought. That opportunity may be important for both electronically stored information and hard-copy materials. However, the inspection and testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.
[8] However, there was also a consensus that parties should identify issues relating to electronic discovery early in the course of litigation, confer about these issues, and address them at case management conferences. The proposed amendments to the rules on civil case management that will be presented to the Judicial Council in the fall of 2008 are intended to promote the early consideration of issues relating to the discovery of electronically stored information.

the form or forms in which each type of electronically stored information is to be produced."[9]

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

*5. Protective Orders (Code Civ. Proc., § 2031.060)*
The provisions of the Civil Discovery Act relating to protective orders would be amended to address the discovery of electronically stored information. Specifically, section 2031.060(a) authorizing protective orders would be amended to expressly refer to "electronically stored information."

A new subdivision (c) would be added, stating: "The party or affected person[10] seeking a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating."[11]

The amended protective order statute would not preclude the discovery of electronically stored information that is not reasonably accessible. A new subdivision (d) would provide: "If the party or affected person[12] 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)."[13] This provision is based on NCCUSL, *Uniform Rules,* Rule 8, subdivision (c).

Under the proposed legislation, the California protective order statute would be further amended to provide that if the court finds that there is good cause for the production of electronically stored information that is not reasonably accessible, it may set conditions for the discovery of the information, including allocation of the expense of discovery. (See amended Code Civ. Proc., § 2031.060(e).)[14]

The amended protective order statute would give the court the authority to limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, provided that the court makes certain determinations.

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[9] This provision is based on NCCUSL, *Uniform Rules,* Rule 7 (Form of Production), subdivision (a).
[10] The version of this provision that circulated for comment included the words "or organization." These words have been deleted as unnecessary because the terms "party" or "person" would include "organization."
[11] This provision is based on NCCUSL, *Uniform Rules,* Rule 8 (Limitations on Discovery), subdivision (b). The provision on burden in Rule 8(b) applies to both motions for protective orders and motions to compel discovery.
[12] See footnote 10, above.
[13] The limitations under subdivision (f) are described below.
[14] This provision is based on NCCUSL, *Uniform Rules,* Rule 8, subdivision (d).

Specifically, new subdivision (f) would provide that the court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that: (1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive; (2) the discovery sought is unreasonably cumulative or duplicative; (3) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. (See Code Civ. Proc., § 2031.060(f).)[15]

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

A number of the commentators expressed a concern that this proposed legislation would require persons from whom the discovery of electronically stored information is sought to bring motions for protective orders in every case. As explained further below, this is neither the intent nor will it be the result of the legislation. To further clarify this matter, additional provisions relating to the discovery of electronically stored information have been added to the code sections on motions to compel and subpoenas in civil proceedings.

*6. Responses* (*Code Civ. Proc., § 2031.280)*
The statute on the forms of production in response to a demand for discovery would be modified to reflect electronic discovery. A new subdivision (c) would be added providing that, if a party responding to a demand for production of electronically stored information objects to the specific form of producing the information, or if no form or forms are specified for in the demand, the responding party shall state in its response the form or forms in which it intends to produce each type of the information.

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

Current subdivision (c) on the expense of translating any data compilations into reasonably usable form would be relocated to subdivision (e), but would otherwise be unchanged.

[15] This provision is based on NCCUSL, *Uniform Rules,* Rule 8, subdivision (e).

*7. Claims of Privilege or Work Product Protection (Code Civ. Proc., § 2031.285)*
The discovery of electronically stored information has created new issues relating to the production of privileged or protected information. Because of the greater extent and volume of electronically stored information, it is more difficult than in the past to determine if information that is being provided pursuant to discovery demands contains privileged or protected material. In response to this situation, modifications to current statutes are appropriate to provide a procedure to deal with the disclosure of privileged or protected information contained in electronic form and produced in discovery.

This legislative proposal would add a new section 2031.285 to the Code of Civil Procedure. The section would provide that, if electronically stored information produced in discovery is subject to a claim of privilege or protection as attorney work product, the party making the claim may notify the party that received the information of the claim and the basis for the claim. (See Code Civ. Proc., § 2031.285(a).) After being notified, the party that received the information shall either immediately return the specified information and any copies it has or present the information to the court conditionally under seal for a determination of the claim. A party that received information subject to a claim of privilege or protection may not disclose it until the claim is resolved. (See Code Civ. Proc., § 2031.285(b)–(d).)[16]

New section 2031.285 provides a procedure for handling privileged or protected materials contained in electronic form and produced in discovery. This procedure is not intended to modify substantive law. In discovery disputes, courts will continue to determine under applicable law whether any information produced in electronic form is privileged or protected, and whether that information is subject to waiver.[17]

*8. Motions to Compel (Code Civ. Proc., § 2031.310)*
The section on motions to compel would be amended to address the discovery of electronically stored information from a source that is not reasonably accessible. Where

[16] This provision is based on NCCUSL, *Uniform Rules*, Rule 9 (Claim of Privilege or Protection After Production), subdivision (a). It has been suggested that the procedure contained in section 2031.285 should apply not only to electronically stored information, but also to all types of information, including hard-copy documents. Because this suggestion was beyond the scope of the proposed legislation, the committee did not take a position on it.
[17] The Reporter's Notes to *Uniform Rules*, Rule 9, states:

> The risk of privilege waiver and the work necessary to avoid it add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver and the time and effort to avoid it can increase substantially because of the volume of electronically stored information and the difficulty of ensuring that all information to be produced has in fact been reviewed. This rule provides a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery and, if the claim is contested, permits any party that received the information to present the matter to the court for resolution. The rule does not address whether the privilege or protection that is asserted after production was waived by the production or ethical implications of use of such data. These issues are left to resolution by other law or authority.

there is an objection to producing such information, the statute would authorize a party to bring a motion to compel.

As under California law generally, the procedure for bringing a motion to compel is an alternative to the procedure under which a responding party may seek a protective order under section 2031.060. To clarify the applicable law, new provisions would be added to the statute on motions to compel similar to the new provisions in the protective order statute regarding the discovery of electronically stored information. These provisions specifically address matters such as the discovery of information from sources that are not reasonably accessible, the burden of proof, the grounds for the court to impose limitations on the frequency and extent of discovery of electronically stored information, and a safe harbor provision. (See Code Civ. Proc., § 2031.310(d)–(g) and (j).)[18]

*9. "Safe Harbor" Provisions (Code Civ. Proc., §§ 2031.060, 2031.300, 2031.310, and 2031.320)*

An important issue relating to electronic discovery is the question of whether sanctions should be imposed on a party that fails to produce electronically stored information that has been lost, damaged, altered, or overwritten because of the routine, good faith operation of an electronic information system. The proposed legislation would add new "safe harbor" provisions to several sanctions statutes, stating: "absent exceptional circumstances, the court shall not impose sanctions on a party or its attorneys for failure to provide electronically stored information lost, damaged, altered, or overwritten as a result of the routine, good-faith operation of an electronic information system."[19]

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

*10. Subpoena Requiring Production of Electronically Stored Information (Code Civ. Proc., § 1985.8)*

This proposal would add a new section 1985.8 to the Code of Civil Procedure relating to the subpoena of electronically stored information.[20] The section provides that a party serving a subpoena requiring the production of electronically stored information may

[18] The version of section 2031.310 that was circulated for comments had not included all these provisions. The committee initially thought that including the provisions in the protective orders statute was sufficient. However, it requested comments on this question. Based on the comments, it became clear than it was important to include such parallel provisions in the statute on motions to compel to clarify that these motions can be brought to resolve disputes concerning the production of electronically stored information and to clarify the standards that apply to such motions.

[19] This proposed "safe-harbor" provision is similar to NCCUSL, *Uniform Rules*, Rule 5; however, it extends beyond information that is "lost" to also cover information that is "damaged, altered, or overwritten."

[20] This section is derived from NCCUSL, *Uniform Rules*, Rule 10. However, like Federal Rule of Civil Procedure 45, the section will directly include all the appropriate new provisions concerning the discovery of electronically stored information rather than simply referring to such provisions generally. This will make the statute clearer.

specify the form or forms in which each type of information is to be produced. (Code Civ. Proc., § 1985.8(b).) It provides for what happens if the subpoenaing party does not specify a form or forms for production. (Code Civ. Proc., § 1985.8(c).)

New section 1985.8 on subpoenas also contains provisions similar to those added to the statutes on motions for a protective order and motions to compel relating to the discovery of electronically stored information. These provisions concern the subpoenaed party's burden of showing that electronically stored information is from a source that is not reasonably accessible, the court's ability to permit discovery of such information on a showing of good cause, and the court's ability to set conditions, allocate expenses, and impose limitations on this discovery. (See Code Civ. Proc., § 1985.8(d)–(f) and (h).)

The new section includes a provision that, if necessary, the person subpoenaed at the reasonable expense of the subpoenaing party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form. (Code Civ. Proc., § 1985.8(g).)

New section 1985.8 includes provisions designed to protect persons who receive subpoenas requiring production of electronically stored information from undue burden or expense. (See Code Civ. Proc., § 1985.8(f)–(h).) Also, it contains a "safe-harbor" provision for persons whose electronically stored information is subpoenaed.

Alternatives Considered

The committee considered the alternative of proposing no new legislation relating to the discovery of electronically stored information and leaving the law unchanged. Some commentators have suggested that existing California law is adequate to deal with such discovery. The committee, however, disagreed with this position. There are compelling reasons to modernize the Code of Civil Procedure at this time to address the discovery of electronically stored information.

Most information today is created and maintained in electronic form. Discovery disputes increasingly involve such information. The proposed legislation will provide direction and guidance for attorneys and judicial officers who are required to consider issues relating to the discovery of electronically stored information. Absent such direction, the practice in this area is likely to evolve in a piece-meal manner and take a long period of time. As recent cases involving electronic discovery issues demonstrate, practitioners would benefit from having more guidance and improved procedures in this important area of the law. Hence, the committee recommends the introduction of legislation to address the discovery of electronically stored information.

Comments From Interested Parties

There was substantial public interest in this proposal. Nearly fifty comments were received. The commentators included attorney organizations, business associations,

corporations, judges, courts, law firms, and individual attorneys. While there was substantial support for the proposal, many commentators suggested specific modifications. Also, some opposed the proposal, preferring the provisions of the federal rules on electronic discovery or no changes to the discovery law.[21]

Support for the proposal came from a wide variety of sources. For instance, California Defense Counsel submitted a comment "express[ing] strong agreement with proposed changes in statewide Rules of Court and statutes relating to electronic discovery." (General Comments, comment 6, pages 33–34.) Similarly, Consumers Attorney of California stated that its organization "strongly supports the proposed changes." (General Comments, comment 10, page 40.)

Attorneys, law firms, and others submitted comments in favor of the proposal. For instance, an attorney commented: "I am strongly in favor of the proposed changes. I believe it would be a more advantageous proposal to that of the federal rules. " (General Comments, comment 2, page 32.) Another attorney stated: "The hard, thoughtful, and detailed work of the committee is to be commended and appreciated. As a civil litigation and trial attorney, I am pleased that a great deal of intellectual energy has gone into crafting a model e-discovery protocol that will avoid the problems encountered in other jurisdictions and achieve fairness, certainty, predictability, and economy." (General Comments, comment 9, page 36.)

A law firm submitted the following comment: "The proposal modernizes the rules and statutes relating to discovery of electronically stored information, within the framework of existing rules and the Civil Discovery Act. We believe that the proposal wisely avoids an attempt to graft recent changes to the Federal Rules of Civil Procedure into California law, where fundamental structural differences exist between the state and federal approaches to discovery. The proposal harmonizes e-discovery rules with existing state timeframes relating to discovery instead of attempting to 'front-load' the discovery process under the federal mode." (General Comments, comment 27, page 48.) A court commissioner, who agreed with the proposal, stated: "Well done." (General Comments, comment 13, page 42.)

Many commentators who supported the proposal recommended specific additions or modifications. For instance, the Joint Rules Subcommittee of the Trial Court Presiding Judges and Court Executives Advisory Committees agreed with the proposal and also recommended the development of bench guides and continuing education for judicial officers relating to electronic discovery. (General Comments, comment 44, page 67.)[22] Similarly, the State Bar's Committee on the Administration of Justice stated that it

[21] A chart summarizing all the the comments and the committee's responses is attached at pages 32–179. The chart is divided into General Comments (pages 32–74) and Specific Comments (pages 75–179).

[22] The committee endorsed the recommendation for bench guides and continuing education on the discovery of electronically stored information. It also supports efforts to inform and educate attorneys on this subject.

"supports the proposal in general, but believes some of the provisions should be modified." (General Comments, comment 36, page 57.) In response to the suggestions from these and other commentators, the committee has made a significant number of revisions to the proposal. The major modifications are later in this report. (See also Specific Comments, pages 75–179.)

A few commentators expressed opposition to the proposal. For instance, the assistant general counsel of a major corporation commented: "[The company] does not support the proposed amendments because they are significantly inconsistent with the recently amended federal rules concerning such discovery and they would create a substantial burden on the parties with inaccessible sources of electronically stored information." (General Comments, comment 31, page 50.) The California Manufacturers and Technology Association also opposed the proposal. (General Comments, comment 7, page 36.) And one commentator expressed the view that the proposal is unnecessary because existing California law is adequate to handle e-discovery issues. (See General Comments, comment 47, page 72–73.)

*Responses to Principal Concerns*

The main concern among those who were critical of the proposal was that it differs from the approach adopted in the recently adopted federal rules relating to the discovery of electronically stored information. The committee carefully considered all the comments on this subject. It concluded, first, that the proposed legislation is actually quite similar to the new federal rules on the discovery of electronically stored information; the legislation adapts those rules so that the provisions relating to the discovery of such information are fully integrated into California's discovery statutes. Second, even though the proposed legislation differs in some respects from the federal rules, it provides a better approach to resolving issues relating to the discovery of electronically stored information in California. The proposed approach is fair, balanced, and efficient.

The commentators favoring the federal approach often mention the "two-tier" approach used in the federal rules. Under this approach, a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or costs. However, the court may order discovery from such sources if the requesting party shows good cause. On a motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. (Fed. Rules Civ.Proc., rule 26(b)(2)(B).) Thus, under the federal system, the responding party is relieved of the need to produce the electronically stored information unless the court orders otherwise.

Although the committee supports the adoption of many of the provisions in the federal and NCCUSL rules, it disagreed with the suggestion that the federal rules should be

adopted in their entirety in California. The committee recommends the current legislative proposal, even though it differs in some respects from the federal approach, because it will work better under California discovery law.

First, the proposed approach is actually not as different from the federal approach as some commentators suggest. Both approaches place the burden on the party from whom discovery is sought to show that information sought is not reasonably accessible because of undue burden or expense. (See Fed. Rules Civ.Proc., rule 26(b)(2)(B) and Code Civ. Proc., §§ 2031.060(b) and 2031.310(d).) Both recognize that courts may place conditions on discovery and limit the frequency or extent of the use of discovery methods if certain determinations are made. (See Fed. Rules Civ.Proc., Rule 26(b)(2)(C) and Code Civ. Proc., §§ 2031.060(f) and 2031.310(g).) And both contain procedures for a party to claim that privileged or protected materials produced in discovery should be returned. (See Fed. Rules Civ.Proc., rules 26(b)(5) and 45(d)(2) and Code Civ. Proc., § 2031.285.)

There are, however, some differences between federal and state discovery procedures and practices. In particular, federal discovery law requires the parties, without awaiting a discovery request, to provide initial disclosures, including a copy of, or a description by category and location of, electronically stored information that the disclosing party may use in support of its claims or defenses. The federal "two-tier" approach to the discovery of electronically stored information from a source that is not reasonably accessible operates within this discovery framework. The information is excluded from disclosure, unless a court orders discovery from such a source. (See Fed. Rules Civ. Proc., rule 26(b)(2)(B).)

By contrast, civil discovery in California is initiated by the parties. The proposed legislation described in this report is designed to work fairly and efficiently within this state's discovery framework. Under California law, when a party demands the production of documents or electronically stored information, the responding party has various options. It may agree to comply with the demand. It may agree to comply in part. It may object to producing the information on various grounds, including that the production would be unduly burdensome. Or it may seek a protective order. If the responding party objects to a demand and does not seek a protective order, the demanding party may move to compel. If there is a motion for a protective order or a motion to compel, the parties must meet and confer to informally resolve each issue raised by the motion.

The California discovery system operates effectively to resolve disputes. The proposed legislation is intended to enable this system to operate even better in resolving disputes relating to the discovery of electronically stored information. In contrast to the federal "two-tier" system that requires a court order to permit the discovery of information from sources that are not reasonably accessible, California's amended discovery statutes should enable discovery disputes over such information to be resolved often without court order.

Under the proposed statutes, a party in California may make a discovery demand for the production of electronically stored information and may specify the form or forms of production that are sought. (At this initial stage of the discovery process, the demanding party often will not possess information as to whether or not the information sought is reasonably accessible. The party may simply ask, for example, for all e-mails between two persons during a certain period of time.) In response to the demand, the party from whom discovery is sought may agree to produce the information, even if it includes information from sources that are not reasonably accessible. Or the responding party may confer with the demanding party about the issues relating to the production, including the production of information from sources that are not reasonably accessible and the expense of producing such information. Or the responding party may object to the demand, providing the grounds for its objections.

Through this discovery process, the parties in California will clarify the bases for any objections to the production of electronically stored information—for example, an objection as to the form of production or an objection that the information sought is from a source that is not reasonably accessible because of undue burden or expense. If the parties are unable to agree upon the production of electronically stored information, a responding party objecting to the production may bring a motion for a protective order under section 2031.060 (amended to specifically address electronic discovery issues). Alternatively, if the responding party objects but does not seek a protective order, the demanding party may move to compel under section 2030.310 (also amended to specifically address electronic discovery issues).

As in all other situations, if there is a motion for a protective order or a motion to compel in a case involving the discovery of electronically stored information, the parties must meet and confer to informally resolve each issue raised by the motion. Often, by means of agreements reached through the meet-and-confer process, discovery disputes will be able to be resolved without a court determination. Thus, the amended statutes operating with the California discovery framework should significantly assist litigants to resolve their disputes regarding the discovery of electronically stored information in a timely and efficient manner.

Some commentators expressed a concern that the proposed legislation will require the party from whom discovery of electronically stored information is sought to bring a motion for a protective order in every case. This is not the intent of the legislation nor will it be its effect. As indicated, the usual California discovery procedures will apply to electronic discovery, including the ability of the party demanding the production of electronically stored information to file a motion to compel; hence, the resolution of disputes over the discovery of electronically information will not always require the filing of motion for protective orders. To clarify this matter, Code of Civil Procedure section 2031.310 has been modified to include provisions parallel to those in section 2031.060 on

motions for protective orders relating to the production of electronically stored information that are from sources that are not reasonably accessible.

The committee believes that, once those who have expressed concerns about the proposal understand how it will actually operate, their concerns should be alleviated.

*Other Issues*
Commentators made a number of other specific comments about the proposal and proposed various modifications. Some of the main issues and the committee's responses are summarized below.[23]

1. *Definitions*. Several comments were received on the definitions of "Electronic" and "Electronically stored information." (Code Civ. Proc., 2016.020(d)–(e).) The committee recommends retaining the version of the definitions that was circulated, which is based on a modified version of NCCUSL Rule 1.

2. *Copying, testing, and sampling*. The proposal would amend the language contained in many statutes referring to "inspecting" to contain broader language also referring to "copying, testing, and sampling." This change is consistent with the federal and NCCUSL rules. Although a few commentators expressed concerns about this change, the committee recommends retaining the proposed new language. This language clarifies the different methods of discovery that are available, including the methods of testing and sampling that may sometimes be used to make the discovery of electronically stored information more cost-efficient.

3. *Form of production*. Commentators suggested replacing "form of production" with "form or forms of production" in several places in the amended statutes. The committee agreed with this suggestion and has revised the text of the amended statutes.

4. *Protective Orders*. The amended version of Code of Civil Procedure section 2031.060 that was circulated proposed a "good cause" standard that the demanding party must meet to obtain the production of electronically stored information that has been established to be from a source that is not reasonably accessible because of undue burden or expense. Although some commentators preferred a balancing test, the committee recommends retaining the proposed "good cause" standard. This standard will give courts greater discretion to address e-discovery issues on an individual basis and an opportunity to develop the law applicable to the discoverability of electronically stored information that is not readily accessible.

[23] For more detailed information about the comments and responses, see Specific Comments, pages 75–179.

5. *Motions to Compel*. Based on the comments, new subdivisions (d)–(g) have been added to section 2031.310. These are provisions parallel to those in amended section 2031.060 (on protective orders) relating to the discovery of information that is not reasonably accessible, the burden of proof, and the bases for limiting the frequency and extent of the discovery of electronically stored information.

6. *Subpoenas*. The committee agreed with suggestions to revise the proposed new statute on subpoenas for the production of electronically stored information. The statute incorporates many of the same provisions concerning the discovery of electronically stored information that are in the statutes on motions for protective orders and motions to compel.

Implementation Requirements and Costs

The proposal will principally affect parties and their attorneys involved in the discovery of electronically stored information. There may be some implementation requirements and costs affecting the courts—such as, for example, providing bench books and education for judges on the new legislation. Overall, the effect of the proposed legislation should be to significantly improve the procedures for the handling of the discovery of electronically stored information in civil cases.

Attachments

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

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

(a) "Action" includes a civil action and a special proceeding of a civil nature.

(b) "Court" means the trial court in which the action is pending, unless otherwise specified.

(c) "Document" and "writing" mean a writing, as defined in Section 250 of the Evidence Code.

(d) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(e) "Electronically stored information" means information that is stored in an electronic medium.

**§ 2031.010**

(a) Any party may obtain discovery within the scope delimited by Chapters 2 (commencing with Section 2017.010) and 3 (commencing with Section 2017.710), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by inspecting, copying, testing, or sampling documents, tangible things, ~~and~~ land or other property, and electronically stored information ~~that are~~ in the possession, custody, or control of any other party to the action.

(b) A party may demand that any other party produce and permit the party making the demand, or someone acting on that party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made.

(c) A party may demand that any other party produce and permit the party making the demand, or someone acting on the party's behalf, to inspect and to photograph, test, or sample any tangible things that are in the possession, custody, or control of the party on whom the demand is made.

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

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

**§ 2031.020**

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

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

(c) Notwithstanding subdivision (b), in an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, a plaintiff may make a demand for inspection, copying, testing, or sampling without leave of the court at any time that is five days after service of the summons on, or appearance by, the party to whom the demand is directed, whichever occurs first.

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

**§ 2031.030**

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

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

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

(1) Designate the documents, tangible things, ~~or~~ land or other property, or electronically stored information to be inspected, copied, tested, or sampled either by specifically describing each individual item or by reasonably particularizing each category of item.

(2) Specify a reasonable time for the inspection, copying, testing, or sampling that is at least 30 days after service of the demand, unless the court for good cause shown has granted leave to specify an earlier date. In an unlawful detainer action or other proceeding under Chapter 4 (commending with Section 1159) of Title 3 of Part 3, the demand shall specify a reasonable time for the inspection, copying, testing, or sampling that is at least five days after service of the demand, unless the court, for good cause shown, has granted leave to specify an earlier date.

(3) Specify a reasonable place for making the inspection, copying, testing, or sampling and performing any related activity.

(4) Specify any inspection, copying, testing, sampling, or related activity that is being demanded ~~in addition to an inspection and copying~~, as well as the manner in which that ~~related~~ activity will be performed, and whether that activity will permanently alter or destroy the item involved.

**§ 2031.040**

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

**§ 2031.050**

(a) In addition to the demands for inspection, copying, testing, or sampling ~~demands~~ permitted by this chapter, a party may propound a supplemental demand to inspect, copy, test, or sample any later acquired or discovered documents, tangible things, ~~or~~ land or other property, or electronically stored

information ~~that are~~ in the possession, custody, or control of the party on whom the demand is made.

(b) A party may propound a supplemental demand for inspection, copying, testing, or sampling ~~demand~~ twice before the initial setting of a trial date, and, subject to the time limits on discovery proceedings and motions provided in Chapter 8 (commencing with Section 2024.010), once after the initial setting of a trial date.

(c) Notwithstanding subdivisions (a) and (b), on motion, for good cause shown, the court may grant leave to a party to propound an additional number of supplemental demands for inspection, copying, testing, or sampling.

**§ 2031.060**

(a) When an inspection, copying, testing, or sampling of documents, tangible things, ~~or~~ places, or electronically stored information has been demanded, the party to whom the demand has been directed, and any other party or affected person or organization, may promptly move for a protective order. This 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 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 all or some of the items or categories of items in the ~~inspection~~ demand need not be produced or made available at all.

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

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

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

(5) 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.

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

(c) The party or affected person seeking a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is from a source that is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating.

(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:

(1) That it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(2) That the discovery sought is unreasonably cumulative or duplicative;

(3) That the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(4) That 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 party to whom the demand was directed provide or permit

the discovery against which protection was sought on 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) Notwithstanding subdivision (h), absent exceptional circumstances, the court shall not impose sanctions on a party or its attorneys for failure to provide electronically stored information lost, damaged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system. This subdivision shall not be construed to alter any obligation to preserve discoverable information.

**§ 2031.210**

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

(1) A statement that the party will comply with the particular demand for inspection, copying, testing, or sampling by the date set for the inspection, copying, testing or sampling pursuant to paragraph (2) of subdivision (c) of Section 2031.030 and any related activities.

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

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

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

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

**§ 2031.220**

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

**§ 2031.230**

A representation of inability to comply with the particular demand for inspection, copying, testing, or sampling shall affirm that a diligent search and a reasonable inquiry has been made in an effort to comply with that demand. This statement shall also specify whether the inability to comply is because the particular item or category has never existed, has been destroyed, has been lost, misplaced, or stolen, or has never been, or is no longer, in the possession, custody, or control of the responding party. The statement shall set forth the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item or category of item.

**§ 2031.240**

(a) If only part of an item or category of item in ~~an inspection demand~~ a demand for inspection, copying, testing, or sampling is objectionable, the response shall contain a statement of compliance, or a representation of inability to comply with respect to the remainder of that item or category.

(b) If the responding party objects to the demand for inspection, copying, testing, or sampling of an item or category of item, the response shall do both of the following:

(1) Identify with particularity any document, tangible thing, ~~or~~ land, or electronically stored information falling within any category of item in the demand to which an objection is being made.

(2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Chapter 4 (commencing with Section 2018.010), that claim shall be expressly asserted.

**§ 2031.250**

(a) The party to whom the demand for inspection, copying, testing, or sampling is directed shall sign the response under oath unless the response contains only objections.

(b) If that party is a public or private corporation or a partnership or association or governmental agency, one of its officers or agents shall sign the response under oath on behalf of that party. If the officer or agent signing the response on behalf of that party is an attorney acting in that capacity for a party, that party waives any lawyer-client privilege and any protection for work product under Chapter 4 (commencing with Section 2018.010) during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.

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

**§ 2031.260**

(a) Within 30 days after service of ~~an inspection~~ a demand for inspection, copying, testing, or sampling, the party to whom the demand is directed shall serve the original of the response to it on the party making the demand, and a copy of the response on all other parties who have appeared in the action, unless on motion of the party making the demand, the court has shortened the time for response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response.

(b) Notwithstanding subdivision (a), in an unlawful detainer action or other proceeding under Chapter 4 (commencing with Section 1159) of Title 3 of Part 3, the party to whom ~~an inspection~~ a demand for inspection, copying, testing, or sampling is directed shall have at least five days from the date of service of the demand to respond, unless on motion of the party making the demand, the court has shortened the time for the response, or unless on motion of the party to whom the demand has been directed, the court has extended the time for response.

**§ 2031.270**

(a) The party demanding ~~an~~ the inspection, copying, testing, or sampling and the responding party may agree to extend the date for the inspection, copying, testing, or sampling or the time for service of a response to a set of

~~inspection~~ demands, or to particular items or categories of items in a set, to a date or dates beyond those provided in Sections 2031.010, 2031.210, 2031.260, and 2031.280.

(b) This agreement may be informal, but it shall be confirmed in a writing that specifies the extended date for the inspection, copying, testing, or sampling or the service of a response.

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

**§ 2031.280**

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

(b) The documents shall be produced on the date specified in the ~~inspection~~ demand pursuant to paragraph (2) of subdivision (c) of Section 2031.030, unless an objection has been made to that date. If the date for inspection has been extended pursuant to Section 2031.270, the documents shall be produced on the date agreed to pursuant to that section.

(c) If a party responding to a demand for production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the demand, the responding party shall state in its response the form in which it intends to produce each type of the information.

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

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

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

~~(c)~~(e) If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form.

**§ 2031.285**

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

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

(c) Prior to the resolution of the motion brought under subdivision (d), a party shall be precluded from using or disclosing the specified information until the claim of privilege is resolved. If the party that received the information disclosed it before being notified, after being notified of a claim of privilege or of protection under subdivision (a), the receiving party shall immediately take reasonable steps to retrieve the information.

(d) Within 30 days of receiving a claim of privilege or protection under subdivision (a), the receiving party may by a motion present the information to the court by lodging it conditionally under seal for a determination of the claim if it contests the legitimacy of the claim of privilege or protection. The receiving party shall preserve the information and keep it confidential, and is precluded from using the information in any manner, until the claim is resolved.

**§ 2031.290**

(a) The demand for inspection, copying, testing, or sampling ~~demand~~ and the response to it shall not be filed with the court.

(b) The party demanding ~~an~~ inspection, copying, testing, or sampling shall retain both the original of the ~~inspection~~ demand, with the original proof of service affixed to it, and the original of the sworn response until six months after final disposition of the action. At that time, both originals may be destroyed, unless the court, on motion of any party and for good cause shown, orders that the originals be preserved for a longer period.

**§ 2031.300**

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

(a) The party to whom the demand for inspection, copying, testing, or sampling ~~demand~~ is directed waives any objection to the demand, including one based on privilege or on the protection for work product under Chapter 4 (commencing with Section 2018.010). The court, on motion, may relieve that party from this waiver on its determination that both of the following conditions are satisfied:

(1) The party has subsequently served a response that is in substantial compliance with Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280.

(2) The party's failure to serve a timely response was the result of mistake, inadvertence, or excusable neglect.

(b) The party making the demand may move for an order compelling response to the ~~inspection~~ demand.

(c) 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 a response to ~~an~~ a demand for inspection, copying, testing, or sampling ~~demand~~, 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. If a party then fails to obey the order compelling a response, 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). In lieu of or in addition to this sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

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

**§ 2031.310**

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

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

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

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

(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 discovery sought by the ~~inspection~~ demand.

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

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

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

(e) 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 (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:

(1) That it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(2) That the discovery sought is unreasonably cumulative or duplicative;

(3) That the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(4) That 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) 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 further response to ~~an inspection~~ a demand, 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)~~(i) If a party fails to obey an order compelling further response, 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). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

(j) Notwithstanding subdivisions (h) and (i), absent exceptional circumstances, the court shall not impose sanctions on a party or its attorneys for failure to provide electronically stored information lost, damaged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system. This subdivision shall not be construed to alter any obligation to preserve discoverable information.

**§ 2031.320**

(a) If a party filing a response to a demand for inspection, copying, testing, or sampling under Sections 2031.210, 2031.220, 2031.230, 2031.240, and 2031.280 thereafter fails to permit the inspection, copying, testing, or sampling in accordance with that party's statement of compliance, the demanding party ~~demanding the inspection~~ may move for an order compelling compliance.

(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 to compel compliance with ~~an inspection~~ a demand, 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) If a party then fails to obey an order compelling inspection, copying, testing, or sampling, 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). In lieu of or in addition to that sanction, the court may impose a monetary sanction under Chapter 7 (commencing with Section 2023.010).

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

**§ 1985.8**

(a) A subpoena in a civil proceeding may require that electronically stored information, as defined in Section 2016.020, be produced and that the party serving the subpoena, or someone acting on the party's request, be permitted to inspect, copy, test, or sample the information. Any subpoena seeking electronically stored information shall comply with the requirements of Chapter 2 of Title 3 of Part 4 of the Code of Civil Procedure.

(b) A party serving a subpoena requiring production of electronically stored information may specify the form or forms in which each type of information is to be produced.

(c) Unless the subpoenaing party and the subpoenaed person otherwise agree or the court otherwise orders:

(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; and

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

(d) A subpoenaed person opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is from a source that is not reasonably accessible because of the undue burden or expense bears the burden of so demonstrating.

(e) 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).

(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) 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 reasonably usable form.

(h) 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:

(1) That it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;

(2) That the discovery sought is unreasonably cumulative or duplicative;

(3) That the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(4) That 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) 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 under section 2031.285, the provisions of that section shall apply.

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

(k) 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) Absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or its attorneys for failure to provide electronically stored information lost, damaged, altered, or overwritten as the result of the routine, good-faith operation of an electronic information system. This subdivision shall not be construed to alter any obligation to preserve discoverable information.

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

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| **General Comments** | | | | | |
| 1. | Eric Amador<br>Fresno, CA | A | N | Agrees, without specific comments. | No response required. |
| 2. | Phillip Baker<br>Baker, Neener and Nahra<br>Pasadena, CA | A | N | I'm strongly in favor of the proposed changes. I believe it would be a more advantageous proposal to that of the federal rules. Instead of requiring all cases to be subject to the proposed e-discovery guidelines, it allows the parties and the court to determine if e-discovery is warranted. I believe it takes the costs into account and addresses the problems with inadvertent disclosure of information. I am in favor of the rules as currently proposed. | The commentator's strong support for the proposed changes is noted. Based on additional comments received, some changes have been made to the proposal. |
| 3. | California Chamber of Commerce<br>Kyla Christoffersen<br>Policy Advocate<br>Sacramento, CA | AM | Y | See specific comments under Code Civ. Proc., § 2031.060. *(These comments are intended to supplement the comments provided by TechNet, the California Chamber of Commerce, and the California Bankers Association.)* | See responses to specific comments. |
| 4. | California Commission on Uniform State Laws<br>Commissioner Pamela Winston Bertoni<br>Sacramento, CA | A | Y | See specific comments on Code Civ. Proc., §§ 1985.9, 2031.080, and 2031.280. | See responses to specific comments. |
| 5. | California Court Reporters Association<br>Lesia Mervin<br>President<br>Aliso Viejo, CA | AM | Y | CCRA applauds the Judicial Council's efforts to more fully utilize available technology. However, CCRA is concerned that the proposed language is broad enough that some trial courts could interpret it to include deposition transcripts and official reporter | It is not the intent of the proposed legislation to alter existing law regarding deposition transcripts or court reporter transcripts. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | transcripts. If that is not the intent of the proposal CCRA requests that that be indicated in the rule.<br><br>If that is the intent of the proposal, there are a number of issues that have been identified (See Reporting of the Record Task Force report) that remain unresolved: Ownership and sale of copies of transcripts; compatibility with the various CAT software programs utilized by deposition and official reporters; potential added cost of producing transcripts; certification of electronically filed transcripts; and labor issues created by a change of working conditions.<br><br>CCRA would oppose this proposal unless and until the issues enumerated above and any other potential issues have been adequately addressed. In order to address these issues, a working group of some sort that includes all stakeholders, including labor, would need to be organized.<br><br>CCRA requests that the current proposal be modified to indicate that this rule does not apply to deposition or official reporter transcripts. | The proposed legislation does not change the law regarding deposition or official reporter transcripts. |
| 6. | California Defense Counsel<br>Edith R. Matthai<br>President | A | Y | On behalf of the California Defense Counsel (CDC), I am writing to express strong agreement with proposed changes in statewide | The CDC's strong agreement with the proposed changes is noted. |



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| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | Sacramento, CA | | | Rules of Court and statutes relating to electronic discovery.<br><br>As you may be aware, the CDC represents civil defense practitioners in California. Participating in a Judicial Council working group on discovery reform capably chaired by Judge Andrew Banks, CDC had a substantial role in the drafting of the proposed rules and statutory changes.<br><br>Our members support the proposed changes for the following reasons:<br><br>• The proposal modernizes the rules and statutes relating to discovery of electronically stored information, within the framework of existing rules and the Civil Discovery Act. We believe that the proposal wisely avoids an attempt to graft recent changes to the Federal Rules of Civil Procedure into California law, where fundamental structural differences exist between the state and federal approaches to discovery. The proposal harmonizes e-discovery rules with existing state timeframes relating to discovery instead of attempting to "front-load" the discovery process under the federal model.<br>• The proposal permits counsel and the court to identify and provide for discovery of electronically stored information (ESI) | |


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| | | | | without incorrectly assuming that all cases involve e-discovery. The retention, retrieval, and disclosure of ESI often involves the expenditure of enormous resources to parties, with the risk that dramatic increases in litigation costs can limit access to justice. The proposal effectively recognizes that sometimes, electronically stored information will be central to cases while in many others ESI will have little or no applicability. The proposal wisely avoids the temptation to require ESI disclosures in every civil case. . . . .<br>• The proposal appropriately balances the need to obtain discovery of electronically stored information against the possibility that the information is not reasonably accessible due to undue burden or expense. In particular, proposed changes to Code of Civil Procedure Section 2031.060 contain workable standards and procedures for obtaining protective orders, and for obtaining discovery even where the court has found that ESI is not reasonably accessible.<br>• Proposed new Code of Civil Procedure section 2031.285 contains critical and well-crafted "clawback" provisions for cases when privileged information is produced, protecting the information until the court can resolve the claim of privilege. | |



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| | | | | *(See also specific comments under Code Civ. Proc., §§ 2031.060 and 2031.285.)* | See also responses to specific comments under Code Civ. Proc., §§ 2031.060 and 2031.285. |
| 7. | California Manufacturers & Technology Association<br>Tax & Corporate Counsel Issues<br>Matt Sutton, Policy Director<br>Sacramento, CA | N | Y | The amount of time for comments is too short. Additional time should be granted for thoughtful comments.<br><br>*(See specific comments under responses to Code Civ. Proc., § 2031.060.)* | The intent is to introduce legislation in 2008; hence, comments were solicited between December 17, 2007 and January 25, 2008.<br><br>See responses to specific comments. |
| 8. | Patrick Cathcart<br>Cathcart Collins, LLP<br>Los Angeles | AM | N | See specific comments under Code Civ. Proc., § 2031.060. | See responses to specific comments. |
| 9. | Michael A. Colton, Esq.<br>Santa Barbara, CA | A | N | The hard, thoughtful, and detailed work of the committee is to be commended and appreciated. As a civil litigation and trial attorney, I am pleased that a great deal of intellectual energy has gone into crafting a model e-discovery protocol that will avoid the problems encountered in other jurisdictions and achieve fairness, certainty, predictability, and economy. A job well done. | The commentator's support for the proposed is noted. |
| 10. | Consumer Attorneys of California | A | Y | Consumer Attorneys of California (CAOC) appreciates the opportunity to comment on the proposed amendments to the Code of Civil Procedure and rules, which are designed to modernize civil discovery law and improve the procedures for handling the discovery of | CAOC's strong support for the proposed amendments to the code and rules is noted. |



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| | | | | electronically stored information. This proposal would amend California's Civil Discovery Act and two rules in the California Rules of Court on the management of civil cases.<br><br>These proposed amendments are the result of an extensive process in which a committee composed of representatives of the Judicial Council, the bench, the plaintiff bar, and the defense bar exchanged viewpoints and proposals. The proposed amendments reflect the best efforts of this committee to arrive at rules governing issues relating to electronic data and electronically stored information during civil discovery.<br><br>At present, California has no rules concerning this issue. The proposed amendments are intended to extend the same principles which underlie the existing framework for civil litigation to issues concerning electronic data and electronically stored information in order to assure that all civil litigants in California state courts have a clear set of rules. To date, there is no uniformity. Trial courts in Mendocino County may have a very different view of these issues than do trial courts in San Diego County. Indeed, different judges in the same county may have different views on how these issues should be addressed. A lack of uniformity in relation to a central aspect of the civil justice system – the discovery process – is | |



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| | | | | in no one's interest, and creates the potential for miscarriages of justice.<br><br>We believe the fundamental guiding principle in modernizing California's discovery law to handle electronic discovery must be in preserving evidence necessary to protect the availability of crucial evidence. These proposed rules strike an important balance in preserving access to evidence while protecting litigants from unnecessary burdens.<br><br>It is critical that California act now; we should not wait to see how the recent amendments to the Federal Rules of Civil Procedure play out. California is considered to be, by itself, one of the largest economies in the world. California's justice system should reflect this reality. California should be a leader, and not a follower, in this regard. Furthermore, a wait and see approach is not likely to lead to resolution. It has been several years now since the Federal Rules of Civil Procedure were amended to address issues of electronic discovery. There have been numerous decisions addressing these amendments. What is it that California practitioners and the bench are supposed to wait for?<br><br>A recent article appearing at www.callaw.com reports on a case that shows the need to act now. The article reports that half a dozen | |



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| | | | | attorneys at a prominent firm were sanctioned by a federal magistrate judge over discovery violations in a patent infringement case. In another case, a vendor "mishap" reportedly resulted in a failure to turn over more than 700,000 e-mails to an examiner in a bankruptcy proceeding. With our rapidly changing technology, California's discovery system must adapt and be ready to protect access to evidence to preserve the integrity of the civil justice system.<br><br>Some have objected to the provisions in the proposed rules which place the burden on the responding party to move for a protective order in those instances in which a dispute arises as to whether electronically stored information need be searched to respond to discovery. This typically occurs where data is resident in backup tapes or storage, and is not readily accessible (although this is by no means the only instance in which this issue would arise). In the federal system, the propounding party bears the burden of moving for a protective order. The proposed amendments in California take a different view for a simple reason: a party objecting to reviewing electronically stored information for discovery purposes bears a burden of demonstrating that the cost and burden of such review outweighs the benefits which might be obtained. Only the objecting party will be in a position to explain | Based on a number of proposed comments, the statutes have been revised to clarify that, in response to an objection to producing electronically stored information from a source that is not reasonably accessible, a motion for a protective order or a motion to compel may be appropriate. (See Code Civ. Proc. §§ 2031.060 and 2031.310.) The proposed legislation provides that, where discovery is further sought of electronically stored information from a source that is not reasonably accessible, the burden is on the objecting or opposing party to show undue burden or expense. On this issue of the |



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| | | | | why it believes this is so – thus making it appropriate to place the burden of moving and the burden of demonstrating cost on the objecting party. The propounding party then must have an opportunity to test the assertions of the objecting party. Otherwise, the party seeking the discovery will not have the opportunity to have the issues framed so that a proper record may be developed and the dispute resolved based on an appropriate record. Placing the burden of moving on the propounding party would make it too easy for a party to evade proper discovery on an incomplete record. This result would be contrary to the interests of justice.<br><br>For these reasons, Consumer Attorneys of California strongly supports the proposed changes. Thank you for the opportunity to participate in this process.<br><br>Respectfully,<br><br>Don Ernst<br>Tom Brandi<br>Steve Williams<br>Paul Kiesel | burden, the proposed legislation, the federal rules, and NCCUSL rules are in accord. |
| 11. | Elan Pharmaceuticals, Inc.<br>Perry S. Goldman<br>Vice President, Legal–Litigation<br>South San Francisco, CA | AM | Y | Elan Pharmaceuticals, Inc. greatly appreciates the Civil and Small Claims Advisory Committee's ongoing efforts to improve the practice and procedure for handling | |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | electronically stored information (ESI) in California courts. During the last several years, Elan has spent millions of dollars related to ESI discovery. Consequently, we strongly support the Committee's efforts to create an efficient ESI discovery process. Reasonable rules targeted at the discovery of electronically stored information will assist parties and courts in conducting discovery in cost-effective and efficient ways with the ultimate goal of resolving matters fairly and expeditiously.<br><br>The Advisory Committee's careful consideration of the federal and other state e-discovery rules, the NCCUSL *Uniform Rules* and California's civil discovery legal framework is clearly evident in the proposed rules. We believe, however, that a few of the proposed provisions that depart from the federal rules would lead to significant inconsistencies in the scope of discovery as well as discovery practice in California and the federal courts and would make discovery in our state less cost-effective and less efficient. Discovery (and e-discovery) costs are by far the largest civil litigation expenses corporations face in litigation, and the ever increasing volume of ESI that is subject to discovery will continue to increase this burden, frequently in disproportion to the likelihood of providing insight to the subject matter of the controversy. For these reasons, substantial | The committee supports the proposed legislation, even though it differs in some respects from the federal rules, for the reasons explained in the report and in the chart containing responses to specific comments.<br><br>The committee does not regard the differences between the California and federal approaches as so substantial, nor does it believe the differences will result in an "enormous impact" as the commentator suggests. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | inconsistencies between the California ESI discovery rules and the federal rules could have an enormous impact on our litigation expenses and discovery efficiency. We, therefore, respectfully submit the following comments.<br><br>*(See specific comments under Code Civ. Proc., §§ 2016.020, 2031.010, 2031.030, 2031.060, and 2031.080.)* | See responses to specific comments below. |
| 12. | Electronic Frontier Foundation<br>Corynne McSherry<br>Staff Attorney<br>San Francisco, CA | AM | Y | Thanks for the opportunity to comment. Overall, Electronic Frontier Foundation approves, the amendments and appreciates the Council's efforts in preparing them. We are concerned, however, that the definition of "electronically stored information" (ESI), as currently formulated, could be misinterpreted to include data stored solely in the transient random access memory (RAM) of a computer.<br><br>*(See specific comments under Code Civ. Proc., §§ 2016.020 and 2031.060.)* | The committee does not believe the issues relating to the discovery of data stored in random access memory (RAM) should be dealt with by means of the definition. They can be handled through the procedures provided under the proposed amendments to the Code of Civil Procedure.<br><br>See responses on specific comments. |
| 13. | Hon. Michele E. Flurer<br>Commissioner<br>Superior Court of California,<br>County of Los Angeles<br>San Pedro, CA | A | N | Well done. I do not believe additional changes are required for a motion to compel further responses. | The commentator's support is noted. Based on other comments, however, some changes have been made to the statute on motions to compel to clarify its application. |



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| 14. | Gap, Inc.<br>Mark Epstein<br>Senior Corporate Counsel<br>San Francisco, CA | AM | Y | See specific comments under Code Civ. Proc., §§ 2016.020, 2031.010, 2031.030, 2031.060, and 2031.080. | See responses to specific comments. |
| 15. | Daniel Garrie<br>Principal<br>CRA International<br>New York, NY | AM | N | See specific comment under § Code Civ. Proc., § 2031.010 | See responses to specific comments. |
| 16. | Genentech, Inc.<br>Todd Kaufman<br>Director, State Government Affairs | AM | Y | On behalf of Genentech, we applaud the Civil and Small Claims Advisory Committee's efforts to improve the practice and procedure for handling electronically stored information (ESI) in California courts. We strongly believe that reasonable rules targeted at the discovery of electronically stored information will assist parties and courts in conducting discovery in cost-effective and efficient ways with the ultimate goal of resolving matters fairly and expeditiously.<br><br>The Advisory Committee's careful considera-tion of the federal and other state e-discovery rules, the NCCUSL *Uniform Rules* and California's civil discovery legal framework is clearly evident in the proposed rules. We do believe, however, that a few of the proposed provisions that depart from the federal rules (and from guidance in existing California rules) would lead to significant inconsistencies in the scope of discovery and discovery practice in California and the federal courts and | The commentator's support for the effort to improve the practice and procedure relating to the discovery of electronically store information is noted.<br><br>The committee supports the proposed legislation, even though it differs in some respects from the federal rules, for the reasons explained in the report and in the chart in response to specific comments. The committee does not consider the differences to be substantial nor will they make discovery in California less cost efficient or effective. On the |


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| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | would make discovery in our state less cost-effective and less efficient.<br><br>Discovery (and e-discovery) costs are by far the largest civil litigation expense corporations face in litigation, and the ever increasing volume of ESI that is subject to discovery will continue to increase this burden, frequently in disproportion to the likelihood of providing insight to the subject matter of the controversy. For these reasons, substantial inconsistencies between the California ESI discovery rules and the federal rules could have an enormous impact on our litigation expenses and discovery efficiency. We, therefore, respectfully submit the following comments.<br><br>*(See specific comments under Code Civ. Proc., 2016.020, 2031.010, 2031.060, and 2031.080.)* | contrary, the differences should improve the efficiency of the e-discovery process in this state.<br><br>The committee does not believe there are substantial inconsistencies between the federal rules and the proposed legislation. However, in order for the federal rules to be integrated into California's statutory discovery framework, it has been necessary to place the e-discovery provisions in a number of different statutes rather than in a few rules.<br><br>See responses to specific comments. |
| 17. | Thomas Green<br>Assistant Attorney General<br>State of Calfiornia<br>Department of Justice<br>Sacramento, CA | AM | N | Thank you for the opportunity to comment on the changes proposed by the Civil and Small Claims Advisory Committee of the California Bar to the Code of Civil Procedure and the California Rules of Court to regulate discovery of "electronically stored information," a new sub-class of information defined by the committee. I write on my own behalf based on my experience both demanding electronic materials in various matters and resisting such demands from others. My comments follow. | |



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| | | | | *(See specific comments under Code Civ. Proc., § 2016.020, 2031.060, and 2031.285 and rule 3.724.)* | See responses to specific comments. |
| 18. | John V. Hager<br>Santa Barbara, CA | N | N | Disagrees, without specific comments. | See report for explanation of the proposal. |
| 19. | Lorraine Dias Herbon<br>Administrative Services Officer II<br>Superior Court of California,<br>County of Sacramento<br>Sacramento, CA | A | N | We have reviewed the proposal and have no comments at this time. | No response required. |
| 20. | International Association of Defense Counsel<br>ESI/e-Discovery Task Force<br>Greg Shelton, Co-Chair<br>Seattle, WA | AM | Y | The International Association of Defense Counsel (IADC) ESI/e-discovery Task Force agrees with the Committee that e-discovery is an important and pressing issue in state and federal courts around the country. We applaud the Committee's efforts to "seek to improve the practices and procedures for handling the discovery of electronically stored information" in California courts. In large part, we believe that the proposed changes will move us toward this goal. Nevertheless, we see areas where significant enhancements must occur in order to achieve fairness to all parties.<br><br>For instance, the provisions relating to the production and protections of ESI that is not reasonably accessible need additional consideration and comment. We are | The committee has revised the proposed legislation to clarify that, if a responding party objects to the production of electronically stored |


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| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | particularly concerned about the deviation from the *Uniform Rules Relating to Discovery of Electronic Information* on these issues. The *Uniform Rules* attempt to reach a level playing field by imposing a balancing test and allowing either party to bring the matter to the Court's attention. More importantly, the *Uniform Rules* allow the responding party to object, rather than immediately invoke the court process and incur extensive costs by filing for a protective order, which gives both parties an opportunity to resolve the matter without court intervention.<br><br>Note: These views are those of the ESI/e-discovery Task Force and do not reflect the views of the entire IADC membership. | information based on a source that is not reasonably accessible because of undue burden or expense, the demanding party may bring a motion to compel. (See Code Civ. Prov., § 2031.310.) Thus, the responding parties will not immediately have to file for a protective order. They will, however, bear the burden of showing that production would be unduly burdensome and costly.<br><br>For the reasons explained in the report, the proposed legislation provides a balanced approach and is consistent with California discovery practice. |
| 21. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | There seems to be a rush. When would the legislation take effect? 2010. This is a complex subject that deserves more time for public scrutiny and comment.<br><br>*(See the specific comments on Code Civ. Proc., §§ 1985.8, 2031.030, 2031.060, 2031.310, 2031.320, 2031.285, and rules 3.724 and 3.728.)* | The intent is to introduce legislation in 2008; hence, comments were solicited between December 17, 2007 and January 25, 2008.<br><br>See responses on specific comments. |
| 22. | Ralph Losey, Attorney<br>Winter Park, FL | N | N | The proposed state laws are unfair primarily because, unlike the federal rules, they fail to provide meaningful protection against | The committee disagrees. It believes the propose procedures are fair and balanced. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | discovery of inaccessible ESI. Instead, they open the door to widespread misuse of requests for this type of information. | |
| 23. | Browning Marean<br>Partner<br>DLA Piper<br>San Diego, CA | AM | N | I am concerned that the amount of time given to respond is too short, given the gravity of the proposed changes.<br><br>I would conform the state rules to the federal rules insofar as possible.<br><br>*(See also specific comments under Code Civ. Proc. § 2031.060.)* | The goal is to introduce the proposed legislation in 2008. Comments were invited between December 17, 2007 and January 25, 2008. These have been carefully considered.<br><br>The committee has drawn on the federal and NCCUSL rules as appropriate, consistent with California discovery practice and procedure.<br><br>See also responses to specific comments. |
| 24. | Kevin McBride<br>Attrorney<br>McBride Law, PC<br>Santa Monica, CA | A | N | I agree with your proposed changes, as is.<br>*(See also specific comment on Code Civ. Proc., § 2031.060.)* | See response to specific comments. |
| 25. | Kevin McCluskey, Esq.<br>Waters, McCluskey & Boehle<br>El Segundo, CA | A | N | Overall, I agree with the proposed changes because we need to update the Civil Discovery Act, relating to electronically stored information. The new provisions compliment the existing rules and appear to be less burdensome to all parties, compared to the Federal Rules. Also, if some privileged documents are inadvertently passed on, the | For the reasons explained in the report, the proposed rules are more appropriate for California than the federal rules. |



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| | | | | new rules provide protection for those documents. Finally, the proposed rules contemplate and understand that electronically stored information will not necessarily be concerns in every civil case, so counsel will not automatically be forced to deal with irrelevant and costly issues, where none exist. | |
| 26. | Hon. William M. Monroe<br>Judge of the Superior Court of California, County of Orange | A | N | Agrees, without specific comments. | No response required. |
| 27. | Lawrence R. Ramsey<br>Bowman and Brooke LLP<br>Gardena, CA | A | Y | On behalf of Bowman and Brooke LLP, I am writing to express strong agreement with proposed changes in statewide rules of court and statutes relating to electronic discovery.<br><br>The proposal modernizes the rules and statutes relating to discovery of electronically stored information, within the framework of existing rules and the Civil Discovery Act. We believe that the proposal wisely avoids an attempt to graft recent changes to the Federal Rules of Civil Procedure into California law, where fundamental structural differences exist between the state and federal approaches to discovery. The proposal harmonizes e-discovery rules with existing state timeframes relating to discovery instead of attempting to "front-load" the discovery process under the federal mode. | The commentator's strong agreement with the proposal is noted.<br><br>As the commentator indicates, the committee has modified the federal and NCCUSL rules to adapt to California discovery practice and procedures. |



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| | | | | *(See also specific comments on Code Civ. Proc., §§ 2031.060 and 2031.285.)* | See responses to specific comments. |
| 28. | San Francisco City Attorney's Office<br>Margaret Baumgartner<br>Deputy City Attorney<br>San Francisco, CA | AM | Y | The City and County of San Francisco provides the following comments on the proposed legislation and rule amendments regarding electronic discovery. Specifically, the City submits comments regarding (1) early resolution of electronic discovery issues, (2) cost shifting and burden of justification for restoration with respect to discovery of electronic information from inaccessible sources, and (3) production of data in native format.<br><br>*(See specific comments under Code Civ. Proc., §§ 2031.060 and 2031.280 and rule 3.724 and 3.728.)* | See responses to specific comments. |
| 29. | Santa Clara County Bar Association<br>Civil Practice Committee<br>Hana Callaghen<br>Associate Executive Director<br>San Jose, CA | AM | Y | The Santa Clara County Bar Association Civil Practice Committee requests specification as to whether or not there is a duty on the producing party to produce documents in a format other than the format in which they are regularly maintained and, if so, which party bears the burden and/or cost of doing so?<br><br>*(See also specific comments on Code Civ. Proc., § § 2031.030 and 2031.080)* | The legislation retains the provision in existing Code of Civil Procedure § 2031.280 (c) [re-lettered as (e)]: "If necessary, the responding party at the reasonable exposure of the demanding party shall, through detection devices, translate any data compilations included on the demand into reasonably usable form."<br><br>See responses to specific comments. |



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| 30. | Christopher Schmidt<br>Deputy County Counsel<br>Tuolumne County Counsel<br>Sonora, CA | A | Y | Agrees, without proposed changes. | No response required. |
| 31. | Charles Schwab & Co., Inc.<br>Curt H. Mueller<br>Vice President/Associate General Counsel<br>San Francisco, CA | N | Y | Schwab does not support the proposed amendments because they are significantly inconsistent with the recently amended Federal Rules concerning such discovery and they would create a substantial burden on parties with inaccessible sources of electronically stored information. The adoption of the proposed amendments would result in an imbalance which would be inefficient and costly not only for the parties, but for the California state courts as well.<br><br>**The Proposed Amendments Reverse The Federal Court Balance.**<br><br>In 2006, after exhaustive consideration, the Federal Rules of Civil Procedure were amended to provide a "two-tiered" approach to discovery of electronically stored information. The Federal Rules draw a distinction between such information which is relatively inaccessible. In a federal court, a requesting party must seek leave of court to obtain discovery of inaccessible sources of electronically stored information.<br>The approach adopted in the Federal Rules makes sense for a number of reasons. Often the discovery needs of a requesting party can | The committee does not agree that the proposed legislation is "significantly inconsistent" with the federal rules. It recommends the proposed legislation, even though it differs in some respects from the federal rules. The committee believes that the legislation achieves a proper balance and properly allocates costs.<br><br>The committee believes that the proposed legislation is not very different from the federal rules, and to the extent it is different, it will operate better within the framework of California's |



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| | | | | be satisfied by obtaining information which is readily accessible. If not, the scope of a follow-up discovery request can be narrowed to seek more limited discovery of inaccessible electronically stored information.<br><br>The proposed amendments upset this common sense approach by initially placing the discovery of all electronically stored information on an equal footing without regard to its utility in litigation or the burden it can create. As a practical matter, it will require a responding party in virtually every corporate civil action to file for a protective order to prevent the discovery of information which is not reasonably accessible due to undue burden and expense.<br><br>Even if a responding party can demonstrate that such information is inaccessible, the proposed amendments would allow a court to order such discovery if the requesting party a show "good cause." What may seem to constitute "good cause" at the outset of a case may differ once the parties engage in initial discovery and frame the issues through the litigation process. A balancing test as adopted by the Federal Rules is the proper approach | discovery law.<br><br>The committee disagrees with this comment. The proposed legislation uses a practical, commonsense approach and properly allocates burdens. It is not the intent of the legislation to require the producing party to file a protective order in every case. Section 2031.310 has been modified to clarify that, if the responding party objects to the production of electronically stored information that is not reasonably accessible, the demanding party may bring a motion to compel.<br><br>The committee believes the proposed "good cause" standard is proper and consistent with California discovery practice and procedure. |



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| | | | | and would be consistent with the time-honored approach to discovery. If a responding party objects to the production of certain information as unduly burdensome and costly, then it should be incumbent on the requesting party to demonstrate that the need for such discovery outweighs the burden and expense, taking into account all of the factors which are generally considered within the context of motions to compel production.<br><br>While it is commendable to specifically address the issues presented by discovery of electronically stored information, it should be done within the general framework of existing discovery procedure. To treat discovery of such information in a fundamentally different manner could create the potential for inconsistent results which would impact the protected nature of such data under the Federal Rules and rules adopted by other states.<br><br>**The Proposed Amendments Would Be Costly and Inefficient.**<br>The proposed amendments would effectively require every corporate party to file a motion for a protective order at the outset of every case. The inefficiencies and costs this would entail are manifest. They would embroil the courts in discovery disputes which may ultimately prove unnecessary, or at a minimum, overbroad in light of the path a case | The proposed e-discovery legislation will operate within the framework of California discovery procedure. It is sufficiently similar to the federal rules that it is not likely to result in significantly different results.<br><br>The committee disagrees with this interpretation of the proposed legislation. As explained above, the proposed amendments will not require every corporation to file a protective rule at the commence-ment of every case. The |



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| | | | | may take. They also may well lead to ill-informed rulings which would be extremely costly to the parties in litigation. These costs ultimately are passed on to a corporation's shareholders and customers.<br><br>The goal of every court case should be an efficient and cost effective resolution of the issues in dispute. The proposed amendments run counter to this fundamental goal and should be rejected. | legislation should in fact make e-discovery more predictable and less costly than under current California law.<br><br>The committee agrees with the commentator that disputes should be resolved in an efficient and cost effective manner. It believes that the proposed legislation will assist in achieving these goals. |
| 32. | Richard L. Seabolt<br>Dane Morris LLP<br>San Francisco, CA | AM | N | The committee deserves thanks for its work on the proposals. Following the Federal Rules changes that became effective December 1, 2006, it was important that California address special problems that arise from electronic discovery. While many principles that are applicable to traditional discovery logically can be extended to electronic discovery, there are, as the Invitation to Comment states, "differences in kind" that merit special treatment. In my view, it also is important for California to adopt new statutory provisions and rules to "raise the consciousness" of the Bench and Bar to the new e-discovery issues. For example, last year when the proposed changes to rule 212 were withdrawn some lawyers told me that they inferred from the absence of California Rules on e-discovery and | The committee agrees with the commentator that it is important that California addresses specific problems that arise from electronic discovery. |



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| | | | | the withdrawal of the proposed rule 212 change that California did not view the parties' e-discovery obligations as seriously as the federal courts viewed those obligations. The new proposals eliminate any possible ambiguity regarding the importance of electronic discovery in California.<br><br>In my view, it is appropriate that California join the nine states identified in footnote 2 of the Invitation to Comment and take a leading role in e-discovery because: (1) we have one of the largest economies in the world; (2) we have one of the largest judicial systems in the world, with undoubtedly the largest volume of litigation in the world; and (3) we generally lead the world's development of the computer technology and internet communication systems that have given rise to e-discovery issues.<br><br>Although today's *Recorder* reports that at least one practitioner has suggested that California should adopt a "wait and see" approach, the changing nature of communications requires an updated approach to discovery issues associated with electronic communications now. Even nine years ago, 93% of all communications were digital. With the ever-increasing tsunami of e-mail communications and the associated importance of e-discovery in litigation, this is not the time to let "the perfect | The committee agrees that the new proposals will clarify the importance of electronic discovery in California.<br><br>The committee agrees with this comment. |



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| | | | | get in the way of the good." In my view, the current committee proposal is very good and should be approved as soon as possible.<br><br>The committee also should be commended for drafting the new California e-discovery proposals so they largely track the new Federal Rules. Practicing lawyers already have many different rules with which they must be familiar. While there may be reasons for differing versions of local rules and the UCC for example, I believe that wherever possible the rules should be uniform or consistent to enhance understandability, as well as to avoid unnecessary or inappropriate forum shopping for different rules as between the federal and state courts and to help avoid litigation over the significance of insignificant differences.<br><br>Despite my general praise for the committee's work and the overall structure of the new e-discovery proposals, I have two suggested changes.<br>*(See specific comments under Code Civ. Proc., § 2031.285 and 2031.300.)* | The committee agrees with this commentator that the proposed legislation is largely similar to the federal rules.<br><br>See responses to specific comments. |
| 33. | John W. Shaw, Partner<br>Shaw, Terhar & LaMontagne LLP<br>Los Angeles, CA | A | N | Agrees, without specific comments. | No response required. |



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| 34. | Michael S. Simon<br>Akerman Senterfitt LLP<br>Attorneys at Law<br>Los Angeles, CA | AM | N | As California e-discovery practitioners we thank the Committee for the opportunity to comment on these important changes to the Rules of Court and the Code of Civil Procedure. Before offering our few comments about the Proposed Draft of *Electronic Discovery: Legislation and Rules*, we would like to commend the Committee and its Advisors on a work well done. We are particularly impressed with the care and attention to a particularly difficult area of the law and problems created by electronic discovery for the courts, our clients and practitioners as well. The draft goes a long way to achieving the goals of providing a reasonable means of discovery while at the same time ensuring that a critical form of conducting business does not become impossibly onerous in litigation.<br>*(See also specific comments under Code Civ. Proc., §§ 2031.060, 2031.210, 2031.240, and 2031.310.)* | The commentator's commendation of the committee for its work on the proposed legislation and rules is noted.<br><br>See responses to specific comments. |
| 35. | David L. Stanton<br>Partner<br>Pillsbury Winthrop Shaw Pittman, LLP<br>Los Angeles, CA | AM | N | I am a partner in the Litigation Department of Pillsbury Winthrop Shaw Pittman, LLP, where I largely represent corporate clients. Much of my practice focuses upon the discovery of electronically stored information ("ESI") and on the design and implementation of records retention and information management systems. | |



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| | | | | I applaud the Committee for taking up the important subject of e-discovery in California state courts. I write, however, to comment upon three aspects of the proposed electronic discovery amendments which, I believe, would result in a tremendous waste of judicial resources and unnecessarily increase the costs of litigation for plaintiffs and defendants alike. *(See specific comments under Code Civ. Proc., § 2031.010 and 2031.060 and rule 3.724.)* | The commentator's concerns are noted.<br><br>See responses to specific comments. |
| 36. | State Bar of California<br>Commmittee on Administration of Justice<br>San Francisco | AM | Y | The State Bar of California's Committee on Administration of Justice (CAJ) has reviewed and analyzed the Judicial Council's Invitation to Comment on Electronic Discovery, and appreciates the opportunity to submit these comments. CAJ commends the Judicial Council's efforts to modernize civil discovery law and improve the procedures for handling the discovery of electronically stored information (ESI). CAJ supports the proposal in general, but believes some of the provisions should be modified.<br>*(See comments on specific code sections and rules below.)*<br><br>Disclaimer:<br>The positions stated in these comments are only that of the State Bar of California's Committee on Administration of Justice. This position has not been adopted by the State Bar's Board of Governors or overall | The CAJ's general support for the proposed is noted.<br><br>See responses to specific comments. |



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| | | | | membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources. | |
| 37. | Sharol H. Strickland<br>Court Executive Officer<br>Superior Court of California,<br>County of Butte<br>Oroville, CA | A | N | Agrees without specific comments. | No response required. |
| 38. | Robert B. Stringer<br>Attorney<br>Crowley, Stringer & Fenske LLP<br>San Francisco, CA | AM | N | I have three comments.<br><br>The [proposal] should address whether the cost of producing ESI is a taxable cost upon conclusion of the action. Making the cost of producing in native format a taxable cost might help check excessive requests for ESI. But for reasons already expressed, I suggest that if a party insists on a non-native format, that it should be at the requesting party's cost, and it therefore should not be a taxable cost.<br><br>*(See also specific comments on Code Civ. Proc., § 20310.0.)* | This is a new proposal, which was not included in the items circulated for comment. It may be considered for future legislation.<br><br>See responses to specific comments. |
| 39. | Superior Court of California,<br>County of Los Angeles<br>Los Angeles, CA | AM | Y | See specific comments under Code Civ. Proc., § 2031.285. | See responses to specific comments. |



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

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| 40. | Superior Court of California,<br>County of San Bernardino<br>Legal Research Department<br>San Bernardino, CA | A | Y | The proposal contains provisions that require the court to make judgments that are technical in nature. For example, what factual situation involves data that is not "reasonably accessible"? (See provision § 2031.060(b).) Another example is what is "routine, good-faith operation of an electronic information system"? (See "Safe Harbor" Provisions at §§ 2031.060, 2031.300, 2031.310, and 2031.320.) Perhaps provisions for appointment and payment for a court expert (see, Evid. Code 730 or an example) or a facilitated procedure for reference to an expert should be added. | This is a new proposal, which was not included in the items circulated for comments. It may be considered for future legislation. |
| 41. | Superior Court of California,<br>County of San Diego<br>Michael M. Roddy<br>Executive Officer<br>San Diego, CA | AM | Y | Our court generally agrees with the proposals, but offers the following comments for consideration:<br><br>1. Copying, testing, or sampling electronic documents and/or electronically stored information, as provided for in the proposals, may allow the requestor access to sensitive and confidential information not intended to be made available electronically and that is irrelevant to the issues in dispute.<br><br>2. Some information is not available electronically and therefore would have to be collected manually from electronic systems, which could be extremely expensive and burdensome on the responding party. | The committee believes that both of the situations presented can be handled within the framework of California discovery law and the proposed changes. The situations proposed for consideration are also good examples of instances where the parties should, by meeting and conferring, be able to agree on stipulations to handle issues relating to confidentiality and expense. |



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| 42. | Superior Court of California,<br>County of Ventura<br>Keri Griffith<br>Senior Manager East County Courthouse<br>Simi Valley | AM | Y | See specific comment under Code Civ. Proc., § 2031.285. | See response to specific comment. |
| 43. | TechNet<br>Jim Hawley<br>Senior Vice President and General Counsel<br>Sacramento, CA | AM | Y | TechNet is pleased to have this opportunity to comment on the Civil and Small Claims Advisory Committee's ("Committee") Electronic Discovery Rule Proposals ("Proposal"). TechNet is a bipartisan organization of Chief Executive Officers and Senior Executives of leading U.S. technology companies. Our members include the nation's drivers of innovation in the fields of information technology and e-commerce, biotechnology, venture capital and investment banking including dozens of California companies. At *www.technet.org/members* you may find a complete list of our members. We are uniquely positioned to comment on complex electronic discovery issues from the perspective of both potential litigants and technology experts.<br><br>TechNet is joined in this comment by the California Chamber of Commerce and the California Bankers Association (CBA). CBA is a nonprofit corporation that represents most of the depository financial institutions in | |



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| | | | | California. The California Chamber of Commerce, representing more than 16,000 companies of all types and sizes, in one of the state's larges, broad-based non-profit organizations. For nearly 120 years, the California Chamber of Commerce has been dedicated to maintaining the state's economic vitality by meeting the needs of California employers. California Chamber of Commerce members employ one-fourth of the private sector workforce in California. Three-fourths of these members have 100 or fewer employees.<br><br>We applaud the committee's effort and express conditional support for the proposal. However, in a couple of key respects the committee has chosen to depart from the federal rule model that guides the majority of the proposal. First, and most significantly, the proposal departs from the federal rules regarding the process for discovery of "inaccessible" electronically stored information. Second, in several ways, the proposal fails to further the important policy of uniformity in rule-making by deviating from the federal rules at the risk of causing confusion for courts and litigants and without any perceivable added benefit. These aspects of the proposal have potentially serious consequences for state court litigants, and prevent us from endorsing the proposal as a whole. Below we explain the reasons for our | The committee notes the commentator's conditional support for the proposed. It further notes that the committee's proposal is not very different from the federal rules. The committee strongly supports the proposal, even though it differs from the federal rules in some respects, for the reasons stated in the report.<br><br>The different approach used in the proposal reflects California's discovery practice and procedure. The committee does not believe that this approach will have the "potentially serious consequences for state court litigants" about |



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| | | | | concern and offer proposed modifications that will bring the proposal in line with the federal rules.<br><br>I. Background<br><br>On December 1, 2006, amendments to the Federal Rules of Civil Procedure governing discovery of electronically stored information went into effect. These recently enacted federal rules represent six years of research, discussion, and debate about whether and how to address the specific discovery issues created by the purge and disparate volume of electronically stored information. The federal Civil Rules Advisory Committee considered comments from attorneys, judges, and organizations most affected by the amendments. It heard live testimony from these stakeholders and experts familiar with the technical side of electronically stored information. In the year since their enactment, the federal rules have largely met with praise for successfully implementing important policies regarding early meet and confer discussions between parties, early and voluntary information sharing, uniformity of approach on complicated electronic discovery issues, and efficient use of parties' and courts' resources. In doing so, the federal rules tend to minimize the potential for discovery burdens to drive litigation outcomes and maximize the | which the commentator is concerned. |



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| | | | | likelihood that the merits determine outcomes.<br><br>In most aspects, the committee's proposal conforms to these December 2006 federal rule changes and emphasizes these same policies. For example, apart from the failure to provide default forms of productions to settle disputes between the parties, the committee's proposed amendments regarding the form of production of electronically stored information conform in many ways to the newly enacted federal rule on this topic. See Proposed Amendments to Cal. Civ. Proc. Code §§ 2031.030(a), 2031.080; Fed. R. civ. P. 34(b). California's proposal also includes a "safe harbor" provision similar to new Federal Rule 37(c), and a "meet and confer" obligation similar to Federal Rule 26(f). See Proposed Amendments to Cal. Civ. Proc. Code §§ 2031.060, 2031.300, 2031.310, 2031.320; Proposed Amendment to Cal. Rules of Court, rule 3.724(b). These provisions were all among the most significant and widely-applauded of the new federal rules. We believe the committee has made a sound decision to model the California rules on them.<br>*(See specific comments under Code Civ. Proc., § 2016.020, 2031.060, and 2031.280.)*<br><br>**The Danger of Inconsistent Rules** | As the commentator notes, the committee's proposal is, in most aspects, similar to the approach used in the federal rules.<br><br>See response to specific comments. |



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| | | | | In addition to the issues outlined above, we have concerns about the overall effect of the proposal's departure from the federal rules and consensus authority. This concern applies especially in the area of inaccessible information, but is the driving force behind each of our concerns. First, the proposal appears to reject other widely-accepted authorities in several important areas, including the Conference of Chief Justices' Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information ("Guidelines"), the ABA Civil Discovery Standards (the ABA "Standards") and NCCUSL *Uniform Rules.* Although the committee confirms that it considered each of these authorities, the proposal's provisions depart from them in some important ways. *See* Invitation to Comment on the proposal, at 2.<br><br>For example, in developing the proposal, the committee reported that "[t]he NCCUSL *Uniform Rules* were found to be particularly useful." Invitation to Comment on the proposal, at 2. Although differing slightly from the federal rules, the *Uniform Rules* allow a party to "object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense." *Uniform Rules*, rule 8(a). The proposal does not include any | The committee does not share the commentator's concerns about the effects of the proposal departing from the federal rules. The proposed legislation does not differ significantly from those rules, including with respect to discovery of information from sources that are not reasonably accessible.<br><br>It is not the intent of the proposal to require parties who object to the discovery of electronically stored information from sources that are not reasonably accessible because of undue burden or expense to always be required to bring a motion in a protective order. To clarify this, the statue on motions to compel has been modified. (See amended Code Civ. Proc., §2031.310.) |



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| | | | | limitation on discovery of inaccessible information absent a protective order. The *Uniform Rules* also allow either party to bring a motion to involve the court in a dispute over accessibility. *Uniform Rules,* rule 8(b).<br><br>Second, because it departs from the federal rules and these other recommended approaches in the ways discussed above, the proposal will create unnecessary confusion for parties and courts through lack of uniform rules. Focusing again on the area of inaccessible information, just within California, responding parties will need to develop and implement essentially opposite approaches to litigating the issue of inaccessible sources in state and federal courts. The mandate for immediate, routine protective order motions has the potential to create inconsistent results regarding the discovery of that information that could eviscerate the protections so successfully implemented by the federal rules. For example, if a party loses a motion to protect an inaccessible source in a California state court, it is not clear how that would affect discoverability of that same source in federal court. Uniform rules promote uniform expectations and interpretations both within and across jurisdictions. | The federal and state approaches are not as different as the comment suggests. As explained above, the proposal will not mandate immediate, routine protective order motions. Often it will be the demanding party that moves to compel production. Also, under California law, the parties must meet and confer regarding every discovery motion. This will assist in resolving disputes. |



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| | | | | Moreover, many companies today litigate in multiple state court jurisdictions. Although most states have not yet adopted their own electronic discovery rules, at least 15 states have adopted or proposed rules regarding discovery from inaccessible sources that are in-line with the federal rules.[1] California gains nothing by setting up so different an approach regarding inaccessible sources, and imposes significant burden on its corporate citizens by doing so.<br><br>**Summary and Proposed Amendment to the Proposal**<br><br>To summarize, we recommend the proposal be modified to conform to the federal rules to: (1) state that a party need not provide discovery from sources of electronically stored information that it has designated as inaccessible; (2) emphasize production and review of information on accessible sources first; (3) allow either party to involve the court if the parties are unable to resolve disputes over accessibility; (4) provide a default form or forms of production that apply to settle | As indicated above, the proposal is not as different from the federal approach as the commentator maintains. The adoption of this proposal will not impose a greater burden than the federal approach. In fact, in many respects, the California approval should provide a more efficient means of resolving disputes.<br><br>The committee's proposal includes several of these proposed modifications. To the extent it still differs, the differences should enable discovery disputes relating to electronically stored information to be resolved fairly and efficiently within the framework of California discovery law. |

[1] See, e.g., Proposed Amendment to Alaska Civ. R. 26(b)(2)(B); Ariz. R. Civ. P. 26(b)(1)); Ind. R. Trial P. 26(C)(9); Proposed Amendment to Iowa R. Civ. P. 1.504(2); La. R. Civ. P. Articles 1461, 1462, comment to 2007 amendment; Proposed Amendment to Md. R. Civ. P. 20402(b)(2); Minn. R. Civ. P. 26.02(b)(2); Mont. R. Civ. P. 26(b)(1); Proposed Amendment to Ohio R. Civ. P. 26(B)(4); Utah R. Civ. P. 269b)(2); Proposed Amendment to Va. Rule of Court 4:9(b)(iii)(B); see also State Court Rules, LexisNexis Applied Discovery (stating that New Mexico, Iowa, Kansas and Washington have issued proposed amendments based on the federal rules), available at, www/lexisnexis.com/applieddiscovery/LawLibrary/StateCourt.asp#top.



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | disputes between the parties; and (5) define "electronically stored information" in a manner that is consistent with the federal rules. Our proposed modifications to the proposal are attached. *(The proposed modifications are located under Code Civ. Proc., §§ 2016.020, 2031.060, 2031.280, and 2031.310.)*<br><br>We believe these suggested changes, although modifications of the current language, will better serve the goals of promoting efficiency, fostering civility, and furthering uniformity in the important area of electronic discovery | See responses to specific proposed modifications. |
| 44. | Trial Court Presidng Judges and Court Executives Advisory Committees<br>Joint Rules Subcommittee<br>Judicial Council of California | A | Y | A court administrator on behalf of the subcommittee comments: While I agree with the proposed legislation and rules, I do see a need to develop bench guides and continuing education for judicial officers that will need to deal with this ever changing field. Resolving disputes about technological issues will require a higher level of expertise and perhaps increase litigation. I am glad to see acknowledgement by the drafters that these rules need to be amended regularly to keep pace with new technological developments. | The committee supports the development of bench guides and continuing education on e-discovery. |
| 45. | Tuolumne County Counsel<br>Christopher Schmidt<br>Deputy County Counsel<br>Sonora, CA | A | Y | Agree with proposed changes. | No response required. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| 46. | Union Bank of California<br>Joseph J. Catalano<br>Senior Vice President and Chief Litigation Counsel<br>San Francisco, CA | AM | Y | We believe that reasonable rules targeted at the discovery of electronically stored information will assist parties and courts in conducting discovery in cost-effective and efficient ways with the ultimate goal of resolving matters fairly and expeditiously.<br><br>The advisory committee's careful consideration of the federal and other state e-discovery rules, the NCCUSL *Uniform Rules* and California's civil discovery legal framework is clearly evident in the proposed rules. We do believe, however, that a few of the proposed provisions that depart from the federal rules would lead to significant inconsistencies in the scope of discovery as well as discovery practice in California and the federal courts and would make discovery in our state less cost-effective and less efficient.<br><br>Discovery (and e-discovery) costs are by far the largest civil litigation expenses corporations' face in litigation, and the ever increasing volume of ESI that is subject to discovery will continue to increase this burden, frequently in disproportion to the likelihood of providing insight to the subject matter of the controversy. For these reasons, substantial inconsistencies between the California ESI discovery rules and the federal rules could have an enormous impact on our litigation | See responses to comment 11 above. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | expenses and discovery efficiency.<br>*(See specific comments under Code Civ. Proc., §§ 2016.020, 2031.030, 2031.060, 2031.030, and 2031.280.)* | See responses to specific comments. |
| 47. | Hon. Carl J. West<br>Judge of the Superior Court of California, County of Los Angeles<br>Los Angeles, CA | N | N | 1. In dealing with issues involving electronic discovery we must recognize the volume of material that can be stored electronically and the manner in which information storage technology dwarfs traditional notions of document retention and storage:<br><br>a. 625 MB CD will hold approximately 55,000 pages<br><br>b. 4.7 GB DVD will hold approximately 411,250 pages<br><br>c. 15 GB hard drive will hold approximately 1,312,500 pages<br><br>d. Firewire USB 2.0 Drive (average 120 GB) will hold approximately 10,500,000 pages<br><br>e. Back-up tape (average 200 GB) will hold approximately 17,500,000 pages<br><br>Typically, modern business operations store hundreds of millions of pages of information in electronic files—discovery of such vast amount of information must be subject to reasonable limitations that provide reasonable access to | 1. The committee agrees that large volumes of materials can be stored electronically and that information storage technology is rapidly changing traditional motions of document retention and storage. This, the committee believes, is a major reason why new legislation and rules on the discovery of electronically stored information are needed. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | necessary information without unnecessary or unreasonable production of unnecessary information. The limited problems we fact today with issues relating to e-discovery will seem insignificant in five or ten years when virtually all discovery will be focused on electronic data. Accordingly, rules and procedures adopted today should not be directed to the short term goal of addressing only "current" issues, but rather to the long term prospect of establishing a workable approach to discovery of electronic data.<br><br>2. Adoption of terms from the Federal Rules may not be in our best interests. Specifically, adding the new term "electronically stored information" will subject our courts and litigants to virtually hundreds of federal district court decisions interpreting the term under the Federal Rules. These decisions are far from uniform; in fact, if one looks hard enough, a decision supporting almost any pro-plaintiff or pro-defendant position can be found. Our current Rules to technology, electronic media, electronic communication, and electronic discovery data and documents. Code Civ. Proc. §2017.710. If we are going to adopt new terms specifically relating to electronic discovery, at the least we should conform existing statutes and rules. | The committee agrees with this comment.<br><br>2. The committee does not agree that the California statues should avoid addressing a definition of electronically stored information just because the federal rules use the term. As proposed Code of Civil Procedure section 2016.020 (d) and (e) indicates, the California definition would be different from the federal definition; hence, the commentator's concern about subjecting California courts and legislation to federal court interpretations to the term is not warranted. |



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| | | | | 3. General references to electronic data or electronic media would permit the California courts to develop their own law concerning emerging issues bought about by technological advances in information generation and storage. I think this would be superior to having to deal with the federal court decisions interpreting the federal rules.<br><br>4. Adoption of civil discovery statutes addressing privilege issues seems inappropriate. Proposals to amend the Evidence Code privilege provisions should be addressed to the Evidence Code and not the Code of Civil Procedure. Adopting a privilege exceptions providing a "quick peek" or "clawback" procedures as proposed by [section] 2031.285 will not advance the world of e-discovery, will not simplify e-discovery, and will most certainly lead to greater work loads for the trial courts that have to address disputes over the implementation of the section. The proposed section essentially relaxes the waiver concept for inadvertent production—a concept that is already established in the case law. Similarly, to the extent the proposed rule imposes guidelines for lawyers to conduct; such issues are already dealt with by the rules of professional conduct.<br><br>5. The concept of requiring parties to identify and discuss e-discovery issues at the initial | 3. As explained above, the amendment of section 2016.020 to include a definition of electronically stored information should not have the consequences cited by the commentator.<br><br>4. The committee disagrees with this comment. The proposed amendments to Code of Civil Procedure section 2031.285 will improve the discovery process by providing a procedure for handling privileged information in electronic form produced during discovery. This procedural statute will not affect the substantive law on privilege or waiver. It should facilitate the task of the trial courts.<br><br>5. The committee agrees the e-discovery issues should be addressed early in litigation. The |



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| | | | | meeting of counsel in advance of the Initial Case Management Conference is a good one, however, in my opinion the proposed rules do not take the concept far enough. Disputes concerning electronic discovery must be resolved in advance of the responding party undertaking the production of electronic data. The burdens and cost of production of electronic data, not to mention the volume of data that may be produced, demand that issues regarding the format and scope of discovery be resolved at the front end of the process.<br><br>6. I think that rules directed to discovery in general should address issues that arise with discovery of electronic data. As a practical matter, as of 2003, businesses in this country generated over 92% of its information in digital format and only 8% on paper. Conventional discovery directed to the production of "hard-copy" paper will rapidly become a thing of the past. Many of the concepts addressed by the proposed rules and statutes attempt to establish special rules for electronic discovery that are, in fact, already in place for purposes of traditional discovery. Cost shifting, inadvertent disclosure, protective orders, and the grounds for justifying or limiting discovery are already addressed in the statutes, rules, and case law. Special rules for discovery of electronic data may lead to a separate body of case law governing such | proposed amended rules, which will be presented to the Judicial Council in the fall, will help promote early consideration on the parties and the courts. This does not mean that the parties cannot, or should not discuss these issues even earlier if possible.<br><br>6. The committee does not agree that the current statues and rules on discovery are adequate to address the new issues raised by electronic discovery. As several other commentators indicate and as the new federal rules recognize, the special challenges of electronic discovery require specific statutes and rules. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | discovery that is neither necessary or, in my opinion, appropriate.<br><br>*(See also specific comments under Code Civ. Proc., §§ 2031.010, 2031.030, 2031.060, 2031.285,)* | See also responses to specific comments. |
| 48. | Richard Williams<br>Partner<br>Holland & Knight LLP<br>Los Angeles, CA | AM | N | I am a partner with the Los Angeles office of Holland & Knight LLP, an international law firm with offices in San Francisco and Los Angeles. Holland & Knight LLP's California-based clients include individuals and businesses of all sizes. As an international law firm Holland & Knight LLP also frequently represents out-of-state and multi-national corporations in litigation in California state courts.<br><br>Consistency and predictability are critically important to litigants, both individual and corporate. The ability of counsel to accurately predict likely outcomes in various phases of litigation enables the parties to make rational choices about whether to litigate, how to conduct their litigation, and whether to settle. For that reason, I generally support [the proposal] as drafted by the California Judicial Council ("the Council") because, overall, the Council has followed the recommendations of the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), as expressed in the *Uniform Rules Relating to* | As the commentator observes, the proposed legislation and rules amendments derive, to a significant extent, from NCCUSL's *Uniform Rules.* |



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| | | | | *Discovery of Electronically Stored Information ("Uniform Rules").*<br><br>A considerable body of case law has developed in the federal courts on many of the most important aspects of electronic discovery. For that reason, the NCCUSL drafted the Uniform Rules to track in large measure the 2006 revisions to the Federal Rules of Civil Procedure ("Federal Rules") on electronic discovery. By modeling the Uniform Rules on the Federal Rules, the NCCUSL has made it possible for state rule-makers to craft rules that will, in turn, permit individual state-court judges to look to federal case law, and the case law of other states that have adopted the Uniform Rules, for guidance as they plunge into the largely uncharted waters (on the state level) of electronic discovery. When state-court decisions are guided by prior decisions of the federal courts and other state courts, the principles of consistency and predictability are well served. This is particularly true with respect to electronic discovery, an area in which technology and the law are constantly changing and evolving.<br>*(See also specific comments on Code Civ. Proc., § 2031.060.)* | As the commentator observes, the proposed rules will permit state court judges to consider the case law of the federal courts and other states. On the other hand, where California's new law on e-discovery differs from that of the federal rules, or the law in other states, courts will look to California law, which is appropriate.<br><br>See response to specific comments. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| **C.C.P., § 2016.020. Definitions** | | | | | |
| 1. | California Chamber of Commerce<br>Kyla Christoffersen<br>Policy Advocate<br>Sacramento, CA | AM | Y | We note that the federal rules specifically chose the phrase "any medium" in order to permit the rules to keep pace with technological advances in media. Further, it may well be technically inaccurate to refer to media as "electronic" in the first instance because media is generally physical material; it is the method of storage that is electronic (or not). So this deviation from the federal rules is likely to render the California statute an anachronism or, worse, a non-sequitur resulting in increased litigation.<br><br>Accordingly, we propose the following language modifications as our first preference, though we also endorse the version proposed in the joint comments as an alternative:<br><br>§ 2016.020. As used in this title:<br><br>(a)–(d) * * *<br><br>(e) "Electronically stored information" means information that is stored electronically in ~~an electronic~~ any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.<br><br>Again, we believe the proposed modifications in these supplementary comments will advance the | The committee considered the federal definition but concluded that it was preferable to recommend the definition that was circulated. That definition is based on a modified version of the NCCUSL definition which uses the term "electronic medium" to distinguish it from paper or hard-copy as the medium. The federal definition includes a limiting phrase that modifies the definition by restricting it to information stored in any medium "from which information can be obtained either directly or, if necessary, indirectly after translation by the responding party into a reasonably usable form." The committee regarded that phrase as not necessary to the definition. Whether ESI can be obtained is a separate issue from its definition that can be addressed through the discovery procedures provided in the new legislation. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | mutually beneficial goals of efficiency, civility, and uniformity in the electronic discovery process. | |
| 2. | Elan Pharmacuticals, Inc.<br>Perry S. Goldman<br>Vice President, Legal–Litigation<br>South San Francisco, CA | AM | Y | Proposed section 2016.020 defines electronically stored information (ESI) as information that is stored in an electronic medium. Though the definition is based on Uniform Rules that the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted, it appears that the Committee chose to omit the NCCUSL modifying clause, "that is retrievable in perceivable form." Similar to the NCCUSL Uniform Rule, Federal Rule of Civil Procedure 34(a) describes electronically stored information as information that can be "obtained, translated, if necessary, by the respondent into reasonably usable form." The Advisory Committee on the Federal Rules of Civil Procedure's notes (Committee Note) reiterates the Committee's intention that ESI include information "stored in a medium from which it can be retrieved and examined." Rule 34 Committee Note.<br><br>We believe that by adopting the full NCCUSL definition for ESI, discovery practice in California will be more consistent with the federal practice and reduce the potential practical problem of discovery that seeks, for example, ephemeral data that cannot be reasonably | This comment is correct. The committee did not think the issue of retrievability should be included in the definition; it can and should be addressed separately.<br><br>The committee disagreed. It believes that issues regarding retrievability can and should be addressed apart from the definition of what constitutes "electronically stored information." |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | preserved or retrieved with out extraordinary effort and expense. | |
| 3. | Electronic Frontier Foundation<br>Corynne McSherry<br>Staff Attorney<br>San Francisco, CA | AM | Y | Thanks for the opportunity to comment. Overall, EFF approves the amendments and appreciates the Council's efforts in preparing them. We are concerned, however, that the definition of "electronically stored information" (ESI), as currently formulated, could be misinterpreted to include data stored solely in the transient random access memory (RAM) of a computer. One federal court has so interpreted the new federal e-discovery rules, and based on that interpretation, required a party to permanently record information that had previously passed only briefly through RAM. See Order Denying Defendants' Motion for Review, *Columbia Pictures Inc. et al v. Justin Bunnell, et al*, C.D. Cal. Case No. 2:06-cv-01093 (FMC) (August 24, 2007).<br><br>The potential implications of this interpretation are breathtaking. After all, every keystroke at a computer keyboard is temporarily held in RAM, even if it is immediately deleted and never saved. Similarly, digital telephone systems make recordings of every conversation, moment by moment, in RAM. Information held only in RAM, however, is generally overwritten by subsequent information or deleted when the computer is turned off. So, unless a litigant takes | The committee regards the proposed definition of "electronically stored information" in Code of Civil Procedure section 2016.020(e) as sufficient and accurate. It believes that issues such as whether a party should be permitted to obtain information held in RAM can and should be dealt with under separate provisions of the law relating to the discovery of electronically stored information. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | steps to capture this information (and thereby creates new documents), information in RAM would disappear.<br><br>Thus, interpreting ESI to encompass RAM data treats information in RAM very differently from information in the analog world. In the analog world, a court would never think to force a company to record telephone calls, transcribe employee conversations, or log other ephemeral information. That is because litigants are not required to create new documents solely for production in discovery. Requiring parties to create new documents to enable production. There is no reason why the rules should be different simply because a company uses digital technologies.<br><br>Further, treating transient RAM data as ESI threatens to radically increase the burdens that companies face in federal lawsuits, potentially forcing them to create and store an avalanche of data, including computer server logs, instant messages, digital telephone conversations, and drafts of documents never saved or sent. And since litigants are obliged to preserve all potentially relevant documents as soon as they reasonably anticipate litigation, this ruling could put counsel in a real quandary. | |



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| | | | | EFF believes the revisions to the federal discovery rules were not intended to create unprecedented discovery obligations—especially preservation obligations—with respect to transient data. Fortunately, California has an opportunity to avoid any possibility of similar confusion by clarifying that its new e-discovery rules do not impose an unprecedented and burdensome obligation to create documents. California may also recognize, however, that in some very extraordinary circumstances, it may be appropriate for a party to seek an early court order requiring preservation of transient data.<br><br>Therefore, we propose that the definition of ESI be modified to state that ESI means "information stored in an electronic medium in a manner that permits its subsequent retrieval in the ordinary course of business. ESI does not include information that is routinely deleted or overwritten immediately following its initial use." Further, we propose that the following language be added to section 2031.060(i): "No party shall be obliged to preserve information that is routinely overwritten or deleted in the ordinary course of business immediately following its initial use, absent a court order based on a showing of extraordinary need." | The committee does not agree with these suggestions for the reasons stated above. As the commentator acknowledges, it may be appropriate in extraordinary circumstances to permit a party to seek an order requiring the preservation of transient data. Hence, it is not appropriate to define ESI so as to eliminate such data from the definition. The committee regards the proposed "safe harbor" provisions as appropriate. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | *(See also specific comments on Code Civ. Proc., § 2031.060.)* | See also responses to specific comments. |
| 4. | Genentech, Inc.<br>Todd Kaufman<br>Director, State Government Affairs | AM | Y | Proposed section 2016.020 defines electronically stored information (ESI) as information that is stored in an electronic medium. Though the definition is based on Uniform Rules that the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafted, it appears that the Committee chose to omit the NCCUSL modifying clause, "that is retrievable in perceivable form." Similar to the NCCUSL Uniform Rule, Federal Rule of Civil Procedure 34(a) describes electronically stored information as information that can be "obtained, translated, if necessary, by the respondent into reasonably usable form." The Advisory Committee on the Federal Rules of Civil Procedure's notes (Committee Note) reiterates the Committee's intention that ESI include information "stored in a medium from which it can be retrieved and examined." Rule 34 Committee Note.<br><br>We believe that by adopting the full NCCUSL definition for ESI, discovery practice in California will be more consistent with the federal practice and reduce the potential practical problem of discovery that seeks, for example, ephemeral data that cannot be reasonably preserved or retrieved with out extraordinary effort and expense. | See responses to comment 2 above. |
| 5. | Thomas Green | AM | N | **Current law authorizes discovery of the digital** | As the commentator indicates, |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | Assistant Attorney General<br>State of California<br>Department of Justice<br>Sacramento, CA | | | **materials encompassed by the committee's definition of "electronically stored information."**<br><br>Cal. Code Civ. Proc., § 2016.20(c) states that for purposes of the California Discovery Act, the words "[d]ocument" and "writing" mean a "writing, as defined in section 250 of the Evidence Code." Evidence Code section 250, in turn, provides that "writing" means:<br><br>…handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.<br><br>The Law Revision Commission has explained that "writing" is "defined broadly to include all forms of tangible expression." 7 Cal.L.Rev. Comm. Reports I (1965). Following the text of the section and its drafting history, courts have found that this definition includes digital information. See, e.g., *TBG Ins. Services Corp.* (2002) 96 Cal.App.4th 443 (inspection demands may probably include a personal computer and the | current law (including Evidence Code, § 250) has been interpreted to extend to at least certain types of electronically stored information (ESI). This, in turn, has led courts to decide that electronically stored information is discoverable. The committee believes that, rather than leave this issue open to interpretation through case law, it would be better and clearer if the Code of Civil Procedure explicitly authorizes the discovery of electronic stored information even if it is not reasonably accessible under certain circumstances, and provides a definition of electronically stored information. |



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| | | | | information stored on it), *Aguimatang v. California State Lottery* (1991) 234 Cal.App. 769, 798 (definition of "writing" in Evidence Code broad enough to include computer records.)<br><br>Although digital information is encompassed by the term "writing," there may be valuable in alerting practitioners to the fact that electronic materials are part of the discovery process by referring specifically to digital sources of evidence in the Code of Civil Procedure. However, care must be taken to make sure that the definition of electronically stored information does not in some way cut against the broad definition of "writing" contained in the Evidence Code.<br><br>**The committee's definition of "electronically stored information" is narrower than the definition of the same term in Fed.R.Civ.P. 34(b) and it should consider an alternate approach.**<br><br>The scope of the Committee's proposal is contained in two new definitions proposed for addition to Code Civ. Proc., § 2016.020. A new subsection (d) provides that "'[e]lectronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." Another new subsection (e) provides that "'[e]lectronically stored information | The committee disagrees that the proposed definition is narrower.<br><br>This states the proposed definition. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | means information stored in an electronic medium."<br>By contrast, Fed.R.Civ.P. 34(a)(1)(A) takes a broader view of what may be discovered. This rule authorizes discovery of:<br><br>(A) any designated documents or electronically stored information– including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably useful form;<br><br>Unlike the committee's proposal, this authorizes discovery of information "stored in any medium." This would appear to be broader than the proposal of the committee although generally consistent with the definition of "writing" in the Evidence Code.<br><br>Given the broad language in Evidence Code, § 250, the committee may wish to consider dropping (d) and (e) in favor of a slight modification in the current Code Civ. Proc., § 2016.020(c) as follows:<br><br>(c) "Document," "writing," and | This states the federal definition.<br><br>Although the phrase "stored in any medium" may appear broader, the full federal definition (including the limiting language, "from which information can be obtained either directly or, if necessary, after translation by the party into a reasonably usable form") is actually narrower. The committee disagrees with the commentator's proposal. It believes section 2016.020(d)–(e) should be retained. |



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| | | | | "electronically stored information" mean a writing, as defined in section 250 of the Evidence Code.<br><br>This change will alert practitioners that digital materials are included in the Discovery Act without confusing current case law. | This suggestion, in fact, would be less likely to alert practitioners that digital materials are covered in discovery than directly including digital materials in the definitions in section 2016.020. |
| 6. | Ralph Losey, Attorney<br>Winter Park, FL | N | N | There are a couple of other things wrong with the proposed California law. First of all, they try and define "electronically stored evidence" by tracking most of the language used by the Uniform Commissioners. The California version is at least an improvement over the Commissioners, as California eliminated the qualification that ESI be "retrievable in perceivable form." The California Judicial Council correctly recognized that this "perception" requirement was confusing at best, and would only lead to unnecessary litigation. Such litigation would typically not be favorable to plaintiffs, and so it is no surprise this qualification was eliminated. But the definition they are left with is, in my opinion, still confusing, and I think at least somewhat nonsensical and contra to the normal accepted usage in e-discovery of the | While the federal approach technically may not be a "definition," it operates as one. (See Fed. Rule Civ. Pro., rule |



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| | | | | phrase "stored in a medium." Although the defense bar may not like this suggestion, I think the proposed definitions should be rejected entirely, and California should follow the federal approach of no definition at all.<br><br>The use of the work "medium" and supposed exhaustive definition of "electronic" bothers me. For instance, why is "wireless" on this list, and why speak in terms of "technology capabilities"? As to "medium," why say stored in an electronic medium. Electronic information is stored in physical mediums, not energetical ones. In the digital world of computers this means information is stored as either a 0 or 1, an electrical switch is either on or off. Thus for instance, a CD, a/k/a optical disk, is said to be the medium on which digital information is stored. It is stored by tiny indentations or pits on the aluminum coating on the surface of a plastic CD. The surface of the CD is read by reflection of laser light. The difference in the laser's reflection off a pit surface, as opposed to a non-pitted "land" surface, is read as a 1 or 0. There are many other ingenious methods for this kind of zero-or-one-storage of binary information using various types of physical mediums, such as hard drives that use magnets instead of lasers. It is all essentially derived from Edison's original idea of storing sound energy on phonographic records. As far as I know, no one can yet reliably store information on energy itself | 34(a)(1)(A).) For the reasons stated in response to the previous comments on the definition, the committee does not support adopting the federal rules on this point.<br><br>The term "electronic medium" in section 2016.020 (e) is used in contrast to paper or print as the medium. This definition is derived from the NCCUSL definition. |



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| | | | | without some kind of underlying physical medium, although I suppose it is theoretically possible with energy interference patterns or something like that.<br><br>Bottom line, all ESI is stored in or on some kind of material thing, that is called the medium on which ESI is stored. That is why I do not like California's phrase "stored in an electric medium," and think it may lead to needless litigation. The comments by the federal rules committee have it right. The federal comments correctly say that ESI covers information "stored in any medium" as long as "it can be retrieved and examined." The more technically enlightened federal approach and their comments should be adopted by California. | For the reasons stated in response to previous comments, the committee supports the definition in section 2016.020(d)-(e) rather than the federal approach. |
| 7. | TechNet<br>Jim Hawley<br>Senior Vice President and General Counsel<br>Sacramento, CA | AM | Y | Federal Rule 34(a)(1)(A) allows a party to request discovery of "electronically stored information…stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." In contrast, the proposal defines "electronically stored information" as "information that is stored in an electronic medium." Proposed Amendment to Cal. Civ. Proc. Code § 2016.020(e). This new formulation risks increased motion practice and inconsistent judicial decisions, without any perceivable benefit. It would be a mistake for | See response to comment 1.<br><br>The committee disagrees that the proposed definition will not be beneficial. It will clarify the law without mingling the |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | California's amendments to remove the clarity established by the federal rules and force state courts to develop independent precedent to govern the scope of electronic discovery. We urge the Judicial Council adopt amendments that define "electronically stored information" in a manner that is consistent with the federal rules.<br><br>Proposed modification:<br><br>**§ 2016.020.** As used in this title:<br><br>(e) "Electronically stored information" means information that is stored in an electronic medium <u>from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.</u> | definition with substantive provisions. |
| 8. | Union Bank of California<br>Joseph J. Catalano<br>Senior Vice President and Chief Litigation Counsel<br>San Francisco, CA | AM | Y | [Same as comment from Elan Pharmaceuticals, Inc.] | [Same as response to Elan Pharmaceuticals, Inc.] |
| | **C.C.P., § 2031.010. Scope of discovery** | | | | |
| 1. | Elan Pharmacuticals, Inc.<br>Perry S. Goldman<br>Vice President, Legal–Litigation<br>South San Francisco, CA | AM | Y | Consistent with the federal rules, proposed section 2031.010 allows discovery of documents, tangible things, land or other property, and electronically stored information by inspecting, copying, testing, or sampling. We ask the Committee to consider an Advisory Committee Comment similar to the FRCP Rule 34(a) Committee Note that provides: | The committee agrees with the contents of the Advisory Committee Note to Federal Rule of Civil Procedure 34(a). However, because section 2031.010 will be in a statute rather than a rule, the content |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | "The addition of testing and sampling to federal Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems." | cannot be placed in an Advisory Committee Comment. As an alternative, the committee supports including the contents of the Note in the legislative history of this proposal. |
| 2. | Daniel Garrie<br>Principal<br>CRA International<br>New York, NY | AM | N | Generally speaking, I think the rules as they are proposed….fail to resolve the fiscal and judicial inequity to people who are not financially well-positioned that sampling creates.<br>Specifically, the litigants will be rewarded for retaining subject matter experts to construct sampling algorithms with regards to discovery motions. Moreover, given the adversarial nature of the discovery process and our judicial system on the whole, sampling is ripe for abuse.<br>Courts will typically have to rely on sampling in situations where litigants have billions of digital records and poorly constructed e-policies. A targeted search through such a litigant's files could yield millions of documents, making it easier for a court to rely on a sampling method instead. Although sampling will be more cost-efficient than a comprehensive search through the litigant's files, there will be a greater likelihood that any individual relevant document remains hidden. This is exacerbated by the cost | The proposed legislation will clarify that sampling may be used in cases involving electronic discovery. This is recognized in the federal and NCCUSL rules and in current California discovery practice. Sampling can be an efficient, cost-effective method of discovery. If experience shows that additional legislation is needed to address fiscal or equity issues, such legislation can be developed and introduced in the future. However, the existing and proposed statutes appear to be adequate to address these issues. |



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| | | | | correlation to the development of a data sampling model. | |
| 3. | Genentech, Inc.<br>Todd Kaufman<br>Director, State Government Affairs | AM | Y | Consistent with the federal rules, proposed section 2031.010 allows discovery of documents, tangible things, land or other property, and electronically stored information by inspecting, copying, testing, or sampling. We ask the Committee to consider an Advisory Committee Comment similar to the FRCP Rule 34(a) Committee Note that provides:<br><br>"The addition of testing and sampling to federal Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems." | See response to comment 1 on pages 87-88. |
| 4. | David L. Stanton<br>Partner<br>Pillsbury Winthrop Shaw Pittman, LLp<br>Los Angeles, CA | AM | N | The proposed e-discovery amendments generally replace the existing notion of "inspecting" tangible things with language that seem to condone the unrestricted "inspection, copying, testing, or sampling" of ESI and ESI-related systems. While the recently-revised Rule 34 of the Federal Rules of Civil Procedure also permits testing and sampling of electronically stored information, it was promulgated with Advisory | See response to comment 1 on pages 87-88. |



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| | | | | Committee comments that serve to curtail an overly broad interpretation of the right to inspect an opposing party's systems and technologies. In particular, the Advisory Committee notes to the 2006 Amendments to Rule 34(a)(1) state:<br><br>"Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems."<br><br>Similar limiting language should be employed in the proposed e-discovery amendments to prevent abuse of an express right to inspect, copy, test or sample electronic information systems. | |

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| 5. | State Bar of California<br>Committee on Administration of Justice | AM | Y | The Committee on Administration of Justice (CAJ) members expressed significant concern that | See response to comment 1 on pages 87-88. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | San Francisco, CA | | | adding "copying, testing or sampling" to the statutory language, where only "inspection" now appears, may be interpreted as permitting direct access to the responding party's electronic systems and devices—or creating a presumption in favor of such access. CAJ recommends including a comment to clarify that the amendments do not establish a new right to or presumption in favor of such unfettered access.[1] | |
| 6. | Union Bank of Calfiornia<br>Joseph J. Catalano<br>Senior Vice President and Chief Litigation Counsel<br>San Francisco, CA | AM | Y | [Same as comment from Elan Pharmaceuticals, Inc.] | [Same as response to Elan Pharmaceuticals, Inc.] |

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[1] Adding such a comment to section 2031.010 would be consistent with the comments to Federal Rule of Civil Procedure 34(a)(1) (the equivalent federal rule). The comment to the federal rule provides, in part:

> Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Advisory Committee Note on the 2006 amendment to Fed.R.Civ.Proc. 34(a)(1).



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| 7. | Hon. Carl J. West<br>Judge of the Superior Court of California, County of Los Angeles<br>Los Angeles, CA | N | N | Introduction of new terms such as "electronically stored information," "testing," and "sampling" does not seem necessary. There is no reason that electronic discovery cannot be addressed through existing rules, with perhaps a reference to "electronic data" or "electronic media" to track other existing statutes. Adoption of the term used by the Federal Rules (electronically stored information or ESI) will invite the use of federal authorities to define and control discovery under California law—in view of the continuing uncertainty created by literally hundreds of federal trial and appellate court opinions interpreting the federal e-discovery rules, use of these opinions as authority to interpret California's rules and statutes will not be productive. | The committee disagreed. It supports the addition of the terms "copying," "testing," and "sampling." This will clarify the scope of discovery for courts and practitioners. It will also make California law consistent with federal and other states' laws, which is desirable in the area of electronic discovery. |
| **C.C.P., § 2031.020. Time for demand** | | | | | |
| | No specific comments on this code section | | | | |
| **C.C.P., § 2031.030. Form of production** | | | | | |
| 1. | Elan Pharmacuticals, Inc.<br>Perry S. Goldman<br>Vice President, Legal–Litigation<br>South San Francisco, CA | AM | Y | The federal rules and the uniform rules both discuss a "form or forms" of production. In acknowledging there may be multiple forms of production, drafters of both the federal and state rules recognized that "different forms of production may be appropriate for different types of electronically stored information." FRCP Rule 34 Committee Note. It appears from proposed section 2031.280(b), which requires a responding party to state "the form in which it intends to | The committee agreed and has replaced "form" with "form or forms." |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | produce each type of information," that this Committee also recognized the possibility that different forms of production would be suitable for different types of ESI. We suggest a reference to "form or forms" of production in the California rules would make this point more clear. | |
| 2. | Genentech, Inc.<br>Todd Kaufman<br>Director, State Government Affairs | AM | Y | The federal rules and the uniform rules both discuss a "form or forms" of production. In acknowledging there may be multiple forms of production, drafters of both the federal and state rules recognized that "different forms of production may be appropriate for different types of electronically stored information." FRCP Rule 34 Committee Note. It appears from proposed section 2031.280(b), which requires a responding party to state "the form in which it intends to produce each type of information," that this Committee also recognized the possibility that different forms of production would be suitable for different types of ESI. We suggest a reference to "form or forms" of production in the California rules would make this point more clear. | The committee agreed and has replaced "form" with "form or forms." |
| 3. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | The provisions are probably an improvement. Basically the responding party controls the form. Because the problems in e-discovery basically concern the scope and form of the production, this is a reasonable provision. | The committee agreed. |
| 4. | Santa Clara County Bar Association | AM | Y | The Santa Clara County Bar Association Civil | The committee disagreed with |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | Civil Practice Committee<br>Hana Callaghan<br>Associate Executive Director<br>San Jose, CA | | | Practice Committee suggests the term "form," as used in section 2031.030(a), as well as throughout the proposed amended sections of the Civil Discovery Act, be defined, e.g., hard-copy, Word, PDF, Unix, JIF, JPEG, ASCII, HTML, Corel, etc. | this suggestion. Because of the rapidly changing nature of technology, it is not a good idea to define a word like "form" in terms of specific, contemporary formats. The statute, or parts of it, would soon become obsolete. |
| 5. | State Bar of California<br>Committee on Administration of Justice<br>San Francisco, CA | AM | Y | The Committee on Administration of Justice (CAJ) recommends that subdivision (a) be modified so it is split into two sentences, the first covering what is mandatory with respect to all inspection demands and the second covering what is permissive with respect to ESI discovery. As modified, the subdivision would read as follows:<br><br>A party demanding ~~an~~ inspection, copying, testing, or sampling shall number each set of demands consecutively~~***, and a***~~. ***A*** party demanding inspection, copying, testing, or sampling of electronically stored information may specify the form in which each type of electronically stored information is to be produced.<br><br>CAJ recommends that subdivision (c)(4) be modified to read as follows (proposed changes shown in bold italics):<br><br>Specify any ***inspection, copying,*** | The committee agreed with this recommendation and has split subdivision (a) into two sentences.<br><br>The committee agreed with this recommendation and has modified the statute to read as suggested. |



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| | | | | ***testing, sampling, or*** related activity that is being demanded ~~***in addition to an inspection, and copying, testing, or sampling,***~~ as well as the manner in which that ~~***related***~~ activity will be performed, and whether that activity will permanently alter or destroy the item involved.<br><br>The existing statute requires a demanding party to specify the manner in which a "related activity" will be performed, and whether that related activity will permanently alter or destroy the item. CAJ sees no reason to limit the specificity requirement in that manner. For example, testing or sampling, the newly added terms, could certainly involve an activity that will permanently alter or destroy an item. CAJ believes the demanding party should be required to specify what activity is being demanded (i.e., inspection, copying, testing, sampling, or a related activity), the manner in which that activity will be performed, and whether that activity will permanently alter or destroy the item involved. | |

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| 6. | Union Bank of California | AM | Y | [Same as comments from Elan Pharmaceuticals, | [Same response as to comments |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | Joseph J. Catalano<br>Senior Vice President and Chief Litigation Counsel<br>San Francisco, CA | | | Inc.] | from Elan Pharmaceuticals, Inc.] |
| 7. | Hon. Carl J. West<br>Judge of the Superior Court of California, County of Los Angeles<br>Los Angeles, CA | N | N | Permitting the requesting party to designate the form of production of electronic data, i.e., native, pdf, tiff, etc., is not in my opinion appropriate. While the form of production of electronic data must be addressed, I believe that it would be best made a requirement of the initial meet and confer process. This would provide the court an opportunity to address the issue before, not after the discovery has taken place. Such an approach would also avoid the likelihood of substantial motion practice challenging the requesting parties designated format. | The committee disagreed with this comment. It is preferable to have the requesting party specify the form in its demand; hence, if the responding party agrees, the production will go forward and there will not even be a need to meet and confer about this issue. Delaying the identification and resolution of issues relating to the form of production is not desirable. |
| **C.C.P., § 2031.040. Service of demand** | | | | | |
| | No specific comments on this code section. | | | | |
| **C.C.P., § 2031.050. Supplemental demands** | | | | | |
| | No specific comments on this code section. | | | | |
| **C.C.P., § 2031.060. Protective order** | | | | | |
| 1. | California Chamber of Commerce<br>Kyla Christoffersen<br>Policy Advocate<br>Sacramento, CA | AM | Y | Although the proposed statutes and rules follow the federal rules by imposing a requirement to show "good cause" in order to prevail on a motion to compel discovery in inaccessible electronically stored information, the proposed rules specifically omitted the specific guidance in the federal rules | The committee supports retaining the proposed "good cause" standard, which will give courts the discretion to develop the law applicable to the production of electronically |



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| | | | | and commentary on the factors to be considered in assessing whether good cause has been shown. In addition, the Committee has specifically requested comments on whether to include guidance for courts and litigants with regard to what constitutes good cause in this context.<br><br>The drafters of the federal rules opted to provide guidance about good cause in order to prevent the burden of discovery (as opposed to the merits) from determining the outcome of the case, Federal Rule 26(B)(2)(C), itself provides for three limitations that weigh against a finding of good cause: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance the proposed discovery in resolving the issues.<br><br>Section 2031.060(f) of the proposed statutes contains essentially the same factors, but unlike the federal rules, these factors are not expressly made a part of the good cause determination in the | stored information from a source that is not reasonably accessible due to undue burden or expense.<br><br>The proposed rules include the same limitations as Federal Rule 26(b)(2)(C) and NCCUSL Rule 8. This set of limitations has been placed in both C.C.P. § 2031.060 (protective orders) and C.C.P. § 2031.310 (motions to compel).<br><br>The committee has added, immediately after the "good cause" provision in section 2031.060(d), the words "subject |



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| | | | | context of determining the discoverability of inaccessible electronically stored information.<br><br>In addition, the commentary to the federal rules provides seven other factors to consider in assessing a good cause assertion:<br>(1) The specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation, and (7) the parties' resources.<br><br>Without limiting principles such as those provided in the federal rules and commentary, there is a risk that the good cause requirement, which is intended to result in a fair balancing of relevant considerations, will be rendered meaningless. In many cases, this silence will defeat the very purpose of the good cause requirement in the first place. This vague, undefined and malleable standard would force settlements based discovery burdens and not on the merits. This risk is especially high in cases where there is an | to any limitations imposed under subdivision (f)." Similar language has been included in section 2031.310(e).<br><br>The committee does not concur with this assessment, especially now that the limiting language has been added to sections 2031.060(d) and 2031.310(e). |



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| | | | | imbalance among the parties in the extent to which they possess electronic data. The laudable goal of the good cause requirement is to prevent just such an occurrence. More specifically, the mere fact of an imbalance of computerization among the litigants should not drive the ultimate outcome of a case—by means of judicial imposition of unduly burdensome discovery duties upon the party possessing a wealth of electronic data. Even the federal rules are not fully successful in preventing discovery costs, as opposed to the merits, from driving outcomes. However, they are far better than no guidance at all. Therefore, guidance similar to that provided in the federal rules and commentary should be added to the proposed statutes.<br><br>Accordingly, we propose the following language modifications:<br><br>**§ 2031.060**<br>(d) If the party or affected person or organization from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court may nonetheless order discovery if the requesting party shows good cause, <u>considering the limitations of subsection (f). In determining whether good cause exists, appropriate considerations may include the following:</u> | The proposed statutes, as revised, are fairly similar to the federal rules.<br><br>The committee has added at the end of subdivision (d) the words "subject to any limitations imposed under subdivision (f)." Particularly in light of the addition of these new words, the list of factors in (1)–(7) is not needed. These factors should be considered separately under section 2031.060(f) with respect to limitations. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | (1) The specificity of the discovery request.<br>(2) The quantity of information available from other and more easily accessed sources;<br>(3) The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;<br>(4) The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;<br>(5) Predictions as to the importance and usefulness of the further information;<br>(6) The importance of the issues at stake in the litigation; and<br>(7) The parties' resources. | |
| 2. | California Commission on Uniform State Laws<br>Pamela Winston Bertaini<br>Commissioner<br>Sacramento, CA | A | Y | Comments are invited regarding whether a good cause standard, or a version of the NCCUSL balancing test, should be used in proposed §2031.060(d). The NCCUSL balancing test appears to be more objective as it lists four specific factors to evaluate in determining whether a court will order discovery shown to be unduly burdensome/expensive.<br><br>The good cause standard appears to be less objective. Also, §2031.060(f) incorporates the NCCUSL balancing test where the court evaluates whether to limit discovery of electronically stored information, even from reasonably accessible sources. By incorporating both a good cause | The committee believes that the proposed legislation correctly states the proper relationship between subdivision (d), with a good cause standard, and adding a cross-reference to the limitations in (f), and (f) itself on possible limits that the court may impose.<br><br>The committee agrees with the comment that the "good cause" standard and the balancing test for limitations should not be merged. Instead, they should be distinguished and cross- |


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| | | | | standard (§ 2031.060(d)) and a balancing test (§2031.060 (f)(4)) in the same rule, §2031.060 may be internally inconsistent and lead to analytical inconsistencies. | referenced as proposed. The proposed legislation properly maintains this distinction. |
| 3. | California Defense Counsel<br>Edith R. Matthai<br>President<br>Sacramento, CA | A | Y | The proposal appropriately balances the need to obtain discovery of electronically stored information against the possibility that the information is not reasonably accessible due to undue burden or expense. In particular, proposed changes to Code of Civil Procedure section 2031.060 contain workable standards and procedures for obtaining protective orders, and for obtaining discovery even where the court has found that ESI is not reasonably accessible. | The committee agreed that the proposal contains workable standards and procedures. |
| 4. | California Manufacturers & Technology Association<br>Matt Sutton, Policy Director<br>Tax & Corporate Counsel Issues<br>Sacramento, CA | N | Y | The provision regarding discovery of inaccessible electronic data (e.g. back up tapes) ("IED") is very unfair to the type of companies that make up the California Manufacturers & Technology Association membership and should not be adopted.<br><br>Discovery from IED back up tapes (designed generally for disaster recovery) is very burdensome and expensive in general. Under the federal rules of civil procedure recently amended, a party with inaccessible data need not initially search IED to respond to discovery; the party seeking discovery must instead go to the court and obtain an affirmative order to search IED where | The committee does not agree that the proposed provisions relating to discovery of data that is not reasonably accessible are unfair. They are quite similar to the federal provisions. To the extent they differ, they are designed to operate with the existing discovery framework under California law, in which parties seek discovery of documents, meet-and-confer about disputed issues, and bring motions if necessary. It is not the intent or |



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| | | | | an analysis takes place on the costs, materiality, and burden. In many circumstances, the information sought exists on live servers of the company, back up tapes merely retain another copy in the event of an earthquake or other disaster, and discovery from such tapes is unnecessary. The proposed California law takes the opposite approach of the federal rules; by default a party would have to search IED to initially respond to a discovery request—unless the party affirmatively seeks a protective order. See proposed Amendment to Cal. Civ. Proc. Code. Section 2031.060.<br><br>If the proposed California rule is adopted, at a minimum it will lead to many unnecessary motions for protective orders being filed to relieve a party of the default burden to search IED.<br><br>The proposed rule regarding IED should not be adopted because it would create an unfair balance that unnecessarily could favor increased burden and litigation costs. | the purpose of the proposed legislation to require that protective orders be routinely filed. The committee has modified section 2031.310 to indicate that motions to compel may be used relating to the discovery of electronically stored information. In most cases, disputes should be resolved without the need to file any motions.<br><br>The committee disagreed with the commentator's conclusion. It believes that the legislation is fair, balanced, and should improve the discovery process. |

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| 5. | Consumer Attorneys of California | A | Y | Some have objected to the provisions in the proposed rules which place the burden on the responding party to move for a protective order in those instances in which a dispute arises as to whether electronically stored information need be searched to respond to discovery. This typically occurs where data is resident in backup tapes or storage, and is not readily accessible (although this is by no means the only instance in which this issue would arise). In the federal system, the propounding party bears the burden of moving for a protective order. The proposed amendments in California take a different view for a simple reason: a party objecting to reviewing electronically stored information for discovery purposes bears a burden of demonstrating that the cost and burden of such review outweighs the benefits which might be obtained. Only the objecting party will be in a position to explain why it believes this is so—thus making it appropriate to place the burden of moving and the burden of demonstrating cost on the objecting party. The propounding party then must have an opportunity to test the assertions of the objecting party. Otherwise, the party seeking the discovery will not have the opportunity to have the issues framed so that a proper record may be developed and the dispute resolved based on an appropriate record. Placing the burden of moving on the propounding party would make it too easy for a party to evade proper discovery on an incomplete | Proposed section 2031.060 places the burden on the party seeking a protective order regarding the production of electronically stored information that it is not reasonably accessible because of undue burden or expense. This is based on NCCUSL rule 8(b). The committee has included a similar provision in proposed section 2031.310 on motions to compel. This allocation of the burden is appropriate because, as the commentator indicates, the responding party will be in a better position to show that the demand for production of ESI imposes an undue burden. |



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| | | | | record. This result would be contrary to the interests of justice. | |
| 6. | County of Los Angeles<br>Office of the County Counsel<br>Thomas Fagan<br>Senior Deputy County Counsel<br>Los Angeles, CA | AM | Y | The proposed new subdivision (c) to the Code of Civil Procedure section 2031.060 strikes the wrong balance, would unduly burden counties, state taxpayers, and the courts; consequently, it should be modified to track the pertinent federal electronic discovery rule.<br><br>The Judicial Council's proposal strikes the wrong balance when a responding party asserts that electronically stored information is not reasonably accessible because of undue burden or expense; consequently, the Judicial Council should modify its proposed changes to strike a more appropriate balance. Such a modification could be accomplished by adopting the approach found in Federal Rules of Civil Procedure, Rule 26(b)(2)(B). Absent such a modification, the Judicial Council's proposal will unreasonably burden public entities, the taxpayers, and the courts.<br><br>As currently written, the Judicial Council's proposal would require the party from whom discovery is sought to rush to court to raise the issue and attempt to secure a protective order when they believe that the electronically stored information is not reasonably accessible due to undue burden or expense. (See proposed new | The committee disagreed with this assessment of section 2031.060.<br><br>The committee believes the proposed legislation and rules strike the proper balance.<br><br>It is not the intent of the proposal to require the responding party always to file a motion for a protective order. The committee has revised the proposal to clarify that, if a responding party objects instead |


Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | subdivision (c) to Code of Civil Procedure section 2031.060, which is described in the Judicial Council's Invitation to Comment at page 5.) The Judicial Council's approach contrasts with that of the federal courts. Under Federal Rules of Civil Procedure, Rule 26(b)(2)(B), "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." So, under the federal system when a demand to discover electronically stored information is deemed by the responding party to be unreasonable due to undue burden or expense, the party is relieved from the need to produce the electronically stored information unless ordered otherwise. | of moving for a protective order, the demanding party may bring a motion to compel the production of electronically stored information from a source that is not reasonably accessible. (See Code Civ. Proc., § 2031.310.) Thus, in California, responding parties will not always be required to bring motions for protective orders relating to such disputes. The new statutes will permit either demanding or responding parties to bring an appropriate motion. On the other hand, the federal approach appears to force the demanding parties to file motions whenever the production of electronically stored information that is not reasonably accessible is in dispute. |


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| 7. | Elan Pharmacuticals, Inc.<br>Perry S. Goldman<br>Vice President, Legal–Litigation<br>South San Francisco, CA | AM | Y | 1. Proposed Code Civ. Proc. § 2031.060 (discovery of ESI from sources that are not reasonably accessible):<br><br>Proposed section 2031.060 departs from the federal rules in one key aspect: Under the proposed California rule, ESI from sources that are not reasonably accessible will become immediately subject to discovery and will force the responding party to move for a protective order. In contrast, the federal rules provide in Rule 26(b)(2)(B) that "[a] party need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or cost."<br><br>The federal rules, as well as the NCCUSL uniform rules, recognize that due to the associated costs and burdens, discovery of ESI from sources that are not reasonably accessible should only be permitted on a heightened showing. In fact, the Committee Note accompanying amended federal Rule 26(b)(2)(B) notes the reality that "[i]n many cases, discovery obtained from accessible sources will be sufficient to meet the needs of the case."<br><br>For instance, the information technology infrastructure for many modern companies relies on data back-up systems that are available in the event of a disaster. Media that stores information from these disaster recovery systems are generally | 1. The committee supports the proposed version of section 2031.060 that was circulated for comment, with certain modifications. The proposed version would permit the discovery of electronically stored information that is not reasonably accessible on a showing of good cause. In response to the comments, the discovery statutes have been further modified to clarify that a dispute over such information may be dealt with by means of either a motion for a protective order or a motion to compel. Under California law, before any such motion is brought, the parties are required to meet and confer. Therefore, disputes will often be resolved without the need for filing a motion. The proposed statutes also include the limitations on discovery provided in the federal and NCCUSL rules. (See C.C.P. § 2031.060(f) and C.C.P. § 2031.310(g).)<br><br>The committee regards the |



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| | | | | considered to be not reasonably accessible sources of electronically stored information when active or other on-line data are available. Unlike a computer hard drive, it is often impossible to simply copy information directly from these back-up systems. Instead, the retrieval of information from such sources often requires a costly and time-consuming process that may yield little or no usable information.<br><br>Under the proposed version of the rules, any company with disaster recovery back-up systems would need to seek a protective order in every civil matter in California. This will create unnecessary legal expenses and will also create additional demands for judicial resources in the very early stages of civil litigation matters.<br><br>To avoid these outcomes, we request that the Committee consider a proposed revision that is more consistent with the federal rules. We agree that the producing party should bear the burden of showing the undue burden and expense of producing data from not reasonably accessible sources, but suggest the parties should first conduct discovery from accessible sources. For more than a year, litigations have dealt with such system under the federal discovery rules and the system has proved workable, fair and efficient. It | proposed legislation as fair, balanced, and consistent with existing California discovery policies and procedures. It believes this legislation will provide a better method of resolving e-discovery than disputes in California than would be provided by simply adopting the federal approach.<br><br>As explained above, companies will not need to seek a protective order in every case under the proposed rules. Indeed, many should be resolved without either a motion for a protective order or a motion to compel production.<br><br>The issue of what electronically stored information is from a source that is not reasonably accessible may not be known to the demanding party. Following the proposed statutory procedures, which are consistent with California discovery law, should clarify and help resolved the issues. |



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| | | | | is unclear to us why California would or should depart from this practice.<br><br>Since accessible sources prove sufficient in most cases, this alternative approach will eliminate the need to litigate early protective order issues related to discovery from not reasonably accessible sources in the majority of cases. Not only would the approach we suggest be consistent with federal practice, it would be in line with California guidelines, such as that expressed in Rule 1.5 that state, "The rules and standards of the California Rules of Court must be liberally construed to ensure the just and speedy determination of the proceedings that they govern."<br><br>2. Proposed Code Civ. Proc. § 2031.060(d) (Invited Comment regarding good cause standard):<br><br>As written, the California amendment authorizes a court to order discovery of information from sources that are not reasonably accessible on a showing of good cause. This committee invited comments about whether the proposal should retain the good cause standard or include a balancing test modeled after the NCCUSL uniform rules.<br><br>We agree with the inclusion of a good cause | 2. The committee agreed that a reference to section 2031.060(f) should be included in subdivision (d). It has added the words: "subject to any limitations imposed under subdivision (f)." |



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| | | | | standard similar to that contained in Federal Rule of Civil Procedure 26(b)(2)(B), which provides, "the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)". We suggest section 2031.060(d) be revised to add the following underlined language: "the court may nonetheless order discovery if the requesting party shows good cause, <u>considering the limitations of section 2031.060(f).</u> | |
| 8. | Electronic Frontier Foundation<br>Corynne McSherry<br>Staff Attorney<br>San Francisco, CA | AM | Y | We propose that the following language be added to section 2031.060(i): "No party shall be obliged to preserve information that is routinely overwritten or deleted in the ordinary course of business immediately following its initial use, absent a court order based on a showing of extraordinary need." | The committee regarded the language in (i) that was circulated as sufficient. |
| 9. | Genentech, Inc.<br>Todd Kaufman<br>Director, State Government Affairs | AM | Y | Proposed section 2031.060 departs from the federal rules in one key aspect. Under the proposed California rule, ESI from sources that are not reasonably accessible will become immediately subject to discovery and will force the responding party to move for a protective order. In contrast, the federal rules provide in Rule 26(b)(2)(B) that "[a] party need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or cost." | See response to comment 7 on pages 106-109. |



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| | | | | The federal rules, as well as the NCCUSL *Uniform Rules*, recognize that due to the associated costs and burdens, discovery of ESI from sources that are not reasonably accessible should only be permitted on a heightened showing. In fact, the Committee Note accompanying amended federal Rule 26(b)(2)(B) notes the reality that "[i]n many cases, discovery obtained from accessible sources will be sufficient to meet the needs of the case."<br><br>For instance, the information technology infrastructure for many modern companies relies on data back-up systems that are available in the event of a disaster. Media that stores information from these disaster recovery systems are generally considered to be not reasonably accessible sources of electronically stored information when active or other on-line data are available. Under the proposed version of the rules, any company with disaster recovery back-up systems would need to seek a protective order in every civil matter in California. This will create unnecessary legal expenses and will also create additional demands for judicial resources in the very early stages of civil litigation matters.<br><br>To avoid these outcomes, we request that the committee consider a proposed revision that is more consistent with the federal rules. We agree | |


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| | | | | that the producing party should bear the burden of showing the undue burden and expense of producing data from not reasonably accessible sources, but suggest the parties should first conduct discovery from accessible sources. Since accessible sources prove sufficient in most cases, this alternative approach will eliminate the need to litigate early protective order issues related to discovery from not reasonably accessible sources in the majority of cases. Not only would the approach we suggest be consistent with federal practice, it would be in line with California guidelines, such as that expressed in Rule 1.5 that state, "The rules and standards of the California Rules of Court must be liberally construed to ensure the just and speedy determination of the proceedings that they govern."<br>…<br>As written, the California amendment [to Code of Civil Procedure section 2031.060(d)] authorizes a court to order discovery of information from sources that are not reasonably accessible on a showing of good cause. This committee invited comments about whether the proposal should retain the good cause standard or include a balancing test modeled after the NCCUSL uniform rules.<br><br>We agree with the inclusion of a good cause standard similar to that contained in Federal Rule of Civil Procedure 26(b)(2)(B), which provides, | |



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| | | | | "the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C)." We suggest section 2031.060(d) be revised to add the following underlined language: "the court may nonetheless order discovery if the requesting party shows good cause, <u>considering the limitations of section 2031.060(f)</u>. | |
| 10. | Thomas Green<br>Assistant Attorney General<br>State of California<br>Department of Justice<br>Sacramento, CA | AM | N | *Toshiba v. Superior Court (Lexar)* (2004) 124 Cal.App.4th 762, is an important landmark in the management of electronic evidence by California trial courts, and establishes a rule that is markedly different from those in federal courts and other state courts. *Lexar* arose from a battle over intellectual property rights over a lucrative software product. One party demanded that the other party turn over all of its records pertaining to the creation of this product irrespective of whether the information was available in active, easily accessible forms or buried away on back-up tapes. The estimated cost of making the back-up tapes available for discovery was between $1.5 and $1.9 million.<br><br>The trial court ordered all of this information turned over to the demanding party, irrespective of costs to the producing party. The court of appeal reversed, focusing on the language of Code Civ. Proc., § 2031.280(c). This subsection provides that "[i]f necessary, the responding party | |



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| | | | | at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably useful form." The appellate court found that resuscitating the back-up takes was a data translation, and had to be paid for by the demanding party, unless the court shifted this responsibility back to the producing party. This is in sharp contrast to historic practice in the federal courts in which the producing party has to pay for reconstruction of archival material unless those costs, in whole or in part, are shifted to the demanding party. See, e.g., *Zubulake v. UBS Warburg (S.D.N.Y. 2003)* 217 F.R.D. 309.<br><br>Despite the practical importance of this issue, it is not clear which party has the initial burden of paying to revive archival material under the committee's proposal. On the one hand, Code Civ. Proc., § 2031.280(c) is not explicitly modified or overruled. On the other hand, the committee's new Code Civ. Proc., § 2031.060[(c)] provides that a person or party arguing that the information demanded is from a source that is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating. Since restoration costs are now paid by the demanding party, unless shifted, this language implies that the committee is allocating the initial burden of producing archived e-mail to the producing party, which would be inconsistent | The proposed legislation retains section 2031.280(c). This provision is not inconsistent with new section 2031.060(c). Section 2031.280(c) concerns who is responsible for paying for translations of data compilations. By contrast, section 2031.060[(c)] concerns who bears the burden of showing that electronically stored information is from a source that is not reasonably accessible because of undue burden or expense. Even if this is shown, the demanding party |



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| | | | | with *Lexar*. Footnote 8 in the explanatory materials indicates that this provision is drawn from a proposal of the National Conference of Commissioners of Uniform State laws, which is not based on California law, supports this reading.<br><br>With millions of dollars in discovery costs potentially at stake, greater clarity in these subsections is essential. Assuming the committee is not overruling *Lexar*, it may wish to consider adding a new subdivision (j) as follows:<br><br>(j) Notwithstanding subsections (b), (d), and (f), the financial burden of producing data translations in accordance with section 2031.280 remains with the demanding party unless some or all of the costs are allocated to the producing party under subsection (e).<br><br>**Portions of proposed Code Civ. Proc., § 2031.060(f) Appear to be unnecessary and the committee should consider giving judges greater discretion to manage electronically stored information.**<br><br>New subsection (f) of the newly amended Code Civ. Proc., § 2031.060(f) requires courts to limit production of ESI, even if accessible, if (1) available from another source; (2) the discovery is | may obtain discovery of the information if it shows good cause.<br><br>Given the language of section 2031.280(c) and the *Toshiba* decision, the new subdivision does not appear to be necessary. |



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| | | | | cumulative; (3) the party seeking discovery had ample opportunity to obtain the information sought and (4) if, on balance, the "burden or expense of the proposed discovery outweighs the likely benefit."<br><br>Although these subparts all have individual merit, they are all subsumed conceptually into the balancing test contained in subdivision (4). Therefore, the committee should consider striking subsections (1)–(3) from its draft.<br><br>In addition, courts can be expected to exercise appropriate discretion when managing electronically stored information. As a consequence, it is not clear that the committee should mandate that judges forbid discovery of ESI in a laundry list of situations. Therefore, the committee should consider amending the prefactory text of subsection (f) to authorize, not mandate, courts to limit discovery of electronically stored information under specified circumstances.<br><br>These two changes would rewrite subdivision (f) as follows:<br><br>(f) The court may limit the extent of discovery of electronically stored information if it determines that the likely burden or expense of the | The committee believes that subparts (1)–(3), which also appear in the federal and NCCUSL rules are useful and should be retained.<br><br>The committee supports keeping subdivision (f) mandatory. The subdivision provides flexibility by giving the judge the ability to decide the frequency or extent of any limitations imposed.<br><br>The committee does not recommend this alternative version of subdivision (f) for the reasons explained above. |



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| | | | | 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. | |
| 11. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | [The absence of a two-tier systems is] a major mistake. I write from the perspective of someone who lectures on the subject and handles many issues of this sort. Although the federal rules have only been in effect for a year, some reasonable procedures have come into general use and acceptance. The proposal would force the responding party to seek a protective order to establish "not reasonably accessible," possibly in every case. The low levels of discovery and trial experience in the Bar result in unreasonably and unnecessarily broad discovery requests.<br><br>Even if found to be inaccessible, still the requesting party can request production "for good cause." You requested comments on wisdom of a balancing test. One is definitely needed.<br><br>If there is good cause, court can allocate the expenses. | The committee supports the proposed legislation rather than the federal two-tiered system. The proposed version is consistent with California discovery law and will result in the fair and efficient resolution of e-discovery issues. Particularly, as revised, it will not require responding parties to file motions for protective orders.<br><br>The committee recommends the "good cause" standard because it is more flexible and will permit the law to evolve.<br><br>As the commentator notes, the court can allocate expenses. |
| 12. | Ralph Losey, Attorney | N | N | This key protection provided in the federal rules is | The committee supports the |



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| | Winter Park, FL | | | found in Rule 26(b)(2)(B). This rule sets up a two-tiered system wherein not-reasonably-accessible ESI comprises the second tier of discovery. You are protected from the expense and burden of searching and producing such information, which can in fact often costs millions of dollars, unless you are faced with a motion to compel. Even then, if a motion to compel is made, and you must then respond, you need only provide proof of burden at that time. If you prove undue burden and cost, the discovery should be prohibited, unless good cause is shown pursuant to the terms of 26(B)(2)(C), which provides for three types of considerations:<br><br>(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.<br><br>The FRCP Commentary provides additional important guidance as to seven factors a court | proposal that was circulated, with certain modifications, rather than the adoption of the federal approach. The reasons are explained in the responses to previous comments on section 2031.060 and in the report.<br><br>The use of a "good cause" |



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| | | | | should consider in making this "good cause" analysis:<br><br>Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.<br><br>The two-tiered system in 26(b)(2)(B) is in my opinion, and that of many others, the key provision to making the federal rules balanced. Litigants with large computer systems depend upon the carefully worded provisions of this rule for protection from overly burdensome requests. Without this rule they are vulnerable to ESI requests that exploit the complexity of their systems, and force settlement to avoid exorbitant costs.<br><br>The e-discovery statutes proposed in California gut this protection entirely, and for that reason | standard in section 2031.060 will permit the courts to consider all appropriate considerations, including those in the commentary and those derived from other sources or situations.<br><br>The proposed approach is balanced and, in the view of the committee, will work more effectively in the California court discovery framework.<br><br>The committee strongly |



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| | | | | alone they are unfair and imbalanced. As Geoff Howard, an e-discovery attorney in San Francisco, puts it in his recent article on the proposed rules: "The California proposal reverses the federal court balance." I agree completely.<br><br>Specifically, the new language proposed for California statute § 2031.060(a) and [(c)] requires the production of all ESI requested unless a motion for protective order is filed and granted. This reverses the order and burden in the federal rules, where the requesting party had to file a motion to compel. You can bet that if these procedural statutes pass there will be a flood of motion practice in California state courts, starting with motions for protective orders in every case to try and prevent the otherwise mandatory search and production of inaccessible ESI. The motions for protection will try and establish undue burden and expense. . . .<br><br>Under the proposed California law, the burden of proof does not stop [with sections 2031.060(a) and (c).] If you persuade the state court judge that the ESI requested is "not reasonably accessible because of undue burden or expense," you will have to produce it anyway "if the requesting party shows good cause." §2031.060(e).<br><br>That sounds sort of like the federal rules which require production anyway upon a showing of | disagrees that its proposal is unfair or unbalanced.<br><br>It is not the intent of the committee to require the filing of protective orders in every case. Section 2031.310, on motions to compel, has been modified to clarify this issue. Under California law, parties are required to meet and confer regarding motions; therefore, many disputes will be resolved without requiring court orders. |

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| | | | | good cause, except for the important, nay critical difference, that the "good cause" in subsection (e) of the California statute is nowhere defined. There is no reference to the three types of considerations found in federal Rule of Civil Procedure 26(b)(2)(C), nor the seven factors found in the federal commentary. Although the proposed statutes do have a provision similar to federal Rule of Civil Procedure 26(b)(2)(C), namely §2031.060(f), the good cause provision in subsection (e) is not specifically tied to the considerations in subsection (f), like the federal rules are. Instead, the Judicial Council commentary expressly states that they considered adding a specific balancing test to the good cause analysis, but rejected it. In my opinion, this is a big mistake.<br><br>As the state commentary shows, the Judicial Council ended up using e-discovery language favoring production that was developed by the National Conference of Commissioners on Uniform State Laws, whose model rules I have previously written about. But the California Judicial Council stripped the other language in the Uniform Laws that tempered this obligation. They eliminated the balancing test the Uniform Commissioners developed to restrain "good cause" and thereby provide a fair approach. This kind of pick and choose approach to the Uniform Commissioners model rules of e-discovery, which | The committee supports the "good cause" standard as more flexible and likely to permit the evolution of the law relating to the production of electronically stored information that is not reasonably accessible. The committee has added to the end of (e) the words "subject to any limitations imposed under subdivision (f)."<br><br>The committee disagreed with this interpretation of the proposal. It believes that the proposal effectively adapts the NCCUSL rules to California's discovery practice and procedures. |



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| | | | | was in turn modeled on the new FRCP rules, results in a California version of 26(b)(2)(B) that is all but unrecognizable. It creates the illusion of a protective provision for defendants, which in reality is no protection at all.<br><br>This belief is buttressed by what I am told by California lawyers about existing law in their state concerning "good cause" for discovery. Existing case law provides no clear guidance on good cause. As a result, the vague good cause requirement typically favors the requesting party, especially the small David in any case against a Goliath, meritorious or not. | The "good cause" standard will evolve and clarify the law based on the courts' experiences with electronic discovery. |
| 13. | Browning Marean<br>Partner<br>DLA Piper<br>San Diego, CA | AM | N | The most interesting, and likely controversial, effect of the proposed amendments concerns the discoverability of inaccessible information. The newly amended federal rules allow a "two-tier system" of discovery where parties need not initially search (though they must, in some cases, preserve) "inaccessible" sources of electronically stored information. A federal court requesting party must obtain that discovery through leave of court.<br><br>The California proposal reverses the federal court balance. The Judicial Council proposed amendments would require a responding party to seek a protective order to prevent discovery of information that is not reasonably accessible | The committee strongly supports the approach to the discovery of electronically stored information that is not reasonably accessible contained in the proposed legislation. Although this approach differs in some respects from the federal approach, the committee believes it will be fair and effective for the reasons stated in the report.<br>The legislation has been modified to clarify that, in appropriate circumstances, a motion to compel rather than a |


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| | | | | due to undue burden or expense. See proposed amendment to Cal. Civ. Proc. Code, § 2031.060. Bringing a motion for a protective order in every California state court case (when the party need not follow the same process in federal court) could create a substantial burden on parties with inaccessible sources of electronically stored information. That procedure also has the potential to create significant uncertainty if a party loses a motion for a protective order in a state case, leading to the discovery of the inaccessible data. The resulting discovery of that information could impact the protected nature of that data under the federal rules. Given the substantial consideration over a period of several years that lead to the federal rule, most states with separate electronic discovery rules have chosen to follow the federal rules more closely. | motion for a protective order may be brought. (See C.C.P., § 2031.310.) So there will not be any need to bring a motion for a protective order in every case, as the commentator asserts. |
| 14. | Kevin McBride<br>Attrorney<br>McBride Law, PC<br>Santa Monica, CA | A | N | I practice in litigation technology and e-discovery, and therefore have experience in these matters. I believe you are correct in placing the burden on a defendant to obtain a protective order if it believes a discovery request is overly broad. That is, after all, the way discovery was done prior to e-discovery. Most e-discovery is rather easily accessible, in actual practice. It has been my experience that too many defense attorneys in federal court routinely refuse to make any meaningful production without the plaintiff first showing cause that production is necessary. In | The committee agreed with the commentator that the burden should be placed on the party who opposes the production of electronically stored information to show that it is from a source that is not reasonably accessible because of undue burden or expense. The proposed legislation is derived from NCCUSL rule 8(b), which similarly allocates the burden. |



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| | | | | practice, this dampens the free-flow of discovery significantly. | However, the proposed legislation has also been revised to provide that this discovery issue may be resolved by order either a motion for a protective or a motion to compel. This is consistent with general California discovery practice and procedure. |
| 15. | Lawrence R. Ramsey<br>Bowman and Brooke LLP<br>Gardena, CA | A | Y | The proposal appropriately balances the need to obtain discovery of electronically stored information against the possibility that the information is not reasonably accessible due to undue burden or expense. In particular, proposed changes to Code of Civil Procedure section 2031.060 contain workable standards and procedures for obtaining protective orders, and for obtaining discovery even where the court has found that ESI is not reasonably accessible. | The committee agreed with this comment. |
| 16. | San Francisco City Attorney's Office<br>Margaret Baumgartner<br>Deputy City Attorney<br>San Francisco, CA | AM | Y | A. <u>Current Law Mandates that Party Requesting Restoration of Backup Tapes Bears Expense</u><br><br>The City believes that the proposed amendment to Code of Civil Procedure § 2031.260 may create ambiguity regarding who bears the expense of recovering or "translating" data from backup tapes.<br><br>Currently, section 2031.280(c), to which the | The committee does not believe that the proposed amendments to section 2031.260 create ambiguity. As the commentator notes, section 2031.280(c) would remain in effect. Its provisions can be reconciled |



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| | | | | Council does not propose amendments, provides:<br><br>"If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably useful form."<br><br>The Court of Appeal in *Toshiba America Electronic Components, Inc.* (2004) 124 Cal. App. 4th 762, held that recovery of information from backup tapes constitutes translation of data, and that § 2031.280(b) therefore mandated that the requesting party bear the reasonable expense of such translation. The Court recognized that "even when the discovery demand is narrowly drawn, the cost of recovering data from backup tapes or other data compilations can be exorbitant." *Toshiba*, 124 Cal. App. 4th at 771.<br><br>Thus, current law creates a presumption that the requesting party must bear the reasonable expense of recovering information from backup tapes.<br><br>B. <u>Proposed Rule Change Creates Ambiguity Regarding Who Bears Expense</u><br><br>Although the proposed amendments to the Code of Civil Procedure do not change the language of § 2031.280(c) [re-lettered as (e)], they appear to place the burden entirely on the responding party | with new section 2031.060. See response to comment 10 on pages 112-114 above.<br><br>This comment misconstrues the effect of the amendments. Section 2031.060(c) concerns |



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| | | | | to either pay for the cost of restoring inaccessible data or to pay the cost of moving for a protective order. This amendment therefore suggests that the requesting party has no obligation to justify the expense.<br><br>The City believes that restoration of backup tapes should be reserved for situations in which the data contained on the backup is the only source of information, and there are other factors that suggest that restoration would be worth the expense. The facts supporting such a determination are not solely in the possession of the responding party. The requesting party is often in the best position to explain why the information it seeks is available only through restoration of the backup tapes, and why the circumstances of the case justify the expense of restoration and review.<br><br>Importantly, a non-corporate plaintiff typically does not have a corresponding expense. For example, the personal injury plaintiff's medical records and other relevant data are unlikely to be preserved in an inaccessible format, while a city street inspector's e-mails referencing where he worked on a particular day, which might tend to show notice, may have been deleted months prior to the claim, and are available only on backup tapes. Without a corresponding expense, there is little incentive to negotiate reasonable boundaries. | the burden of showing that electronically stored information is not reasonably accessible because of undue burden or expense; this is a different issue from who is responsible for the expense of translating data compilations under section 2031.280(c). In determining who should bear other expenses and what other conditions or limitations might be imposed, courts and litigants will also look to new subdivisions (e) and (f) of section 2031.060. |



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| | | | | C. Recommendation<br><br>For these reasons, the City Attorney suggests that the amendments confirm that *Toshiba* remains valid law, and provide a procedure by which the requesting party shares some burden in justifying the restoration and review of inaccessible data. This would not place information from back-up tapes beyond the reach of all litigants; rather, it merely would require a requesting party to justify the need for preservation and restoration of backup tapes and other inaccessible data and provide some incentive for the requesting party to do so. Moreover, under *Toshiba,* the court would be free to shift the cost of recovery from backup tapes to the responding party where circumstances suggest that party has acted in bad faith to destroy or otherwise make inaccessible relevant data. | The committee's legislative proposal does not change the language of section 2031.280(c) or the holding in the *Toshiba* decision. The proposal not only retains the current language in section 2031.280(c) [re-lettered as (e)], but also includes it in new section 1985.8. |
| 17. | Charles Schwab & Co., Inc.<br>Curt H. Mueller<br>Vice President/Associate General Counsel<br>San Francisco, CA | N | Y | See General Comments. | See responses to General Comment. |
| 18. | Michael S. Simon<br>Akerman Senterfitt LLP<br>Attorneys at Law<br>Los Angeles, CA | AM | N | We recognize that the draft relies heavily on the *Uniform Rules Relating to Discovery of Electronically Stored Information,* as it should, based upon the expertise and experience of those who have been involved as its drafters. And it is based upon this expertise that we respond to the Invitation to Comment's request for "[c]omments | |



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| | | | | . . . on whether a good cause standard or a version of the NCCUSL, balancing test should be used in new section 2031.060(d)."<br><br>Our comments are offered in the situation where electronic discovery is not reasonably accessible and consist of two basic proposals: (1) reverting the "good cause" standard for production of such data back to the NCCUSL balancing test; and (2) adding a parallel provision for motions to compel production under §2031.310.<br><br>Due to the potentially significant cost and burden of producing electronically stored information that is not reasonably accessible, the NCCUSL adopted a balancing test that requires both that the requesting party establishes its need for the information and that the trial court weigh this need against the cost and burden to the producing party. As currently proposed, the good cause test does not balance these interests in determining whether to order production.<br><br>Although the current draft then leaves the trial court with the option of taking remedial measures such as reallocating costs, this is only after the decision to order production has already occurred. This procedure thus ensures that this burden will be imposed on someone. This is different from the NCCUSL balancing test because that test affords the trial court the option to determine that | The committee (1) disagreed with the commentator's proposal to substitute the balancing test for the "good cause" standard, and (2) agreed with the proposal to provide parallel provisions for motions to compel. (See discussion of section 2031.310 below.) |



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| | | | | the burden of production outweighs the benefit to anyone and to therefore determine that no production should be ordered. We believe that, by preserving this option not to order production of such inaccessible information, the balancing test affords the trial courts greater flexibility to reach the fairest decision possible.<br><br>Using the balancing test as the standard our proposed revisions to the draft create a consistency throughout the entire discovery process. As drafted the test arises in the context of a motion for protective order. Indeed Rule 8 of the NCCUSL recognizes that the issue of accessibility of electronic discovery first arises in a request for production. The Rule provides – unlike the current California draft – that an appropriate objection may be made in response to the request. Rule 8(a). The NCCUSL Rule then provides for a motion to compel process after such objection Rule 8(b). However, the present proposed draft only addresses motions for a protective order, leaving in place the existing §2031.310 concerning motions to compel. This creates ambiguity because; while the proposed amendments do not specifically address motions to compel they also do not prohibit them.<br><br>We believe that such motions to compel should be specifically addressed and approved as a proper method to resolve issues of claims that electronic | Under the "good cause" standard, the court can decline to order the production of information that is not reasonably accessible in appropriate circumstances.<br><br>It is not the intent of the legislation to prevent objections or motions to compel. To clarify this, section 2031.310 has been modified.<br><br>The committee agreed with this point and has addressed motions to compel by |



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| | | | | stored information is not reasonably accessible. Indeed, we believe that the motion to compel may often prove to be a superior method because, since it does not occur as soon after the original demand for production as does a motion for a protective order, it affords the parties more opportunity to evaluate and informally resolve the issues before resorting to extensive motion practice that consumes valuable time of both the parties and of the trial court.<br><br>To create this consistency we have:<br><br>(1) Converted the proposal in § 2031.060 from a good cause test to the balancing language used in NCCUSL Rule 8 (c) and (d);<br><br>(2) Created parallel language in the motion to compel § 2031.310; and,<br><br>(3) Made clear in §§ 2031.210 and 2031.240 that inaccessibility is a proper grounds for objection to a request for production and have emphasized that the objection must be specifically made.<br><br>The proposed revisions are bolded below: | proposing further modifications to section 2031.310.<br><br>(1) The committee did not agree with this suggestion.<br><br>(2) The committee agreed with this suggestion and has modified the statute, though somewhat differently than proposed.<br><br>(3) The committee believes that valid objections to the production of inaccessible information may be raised, but does not support the specific amendments proposed. |



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| | | | | **§ 2031.060**<br>(a)-(c) * * *<br><br>**(d) If the party or affected person or organization from whom discovery of electronically stored information is sought establishes that the information is from a source that is not reasonably accessible because of undue burden or expense, the court shall not order the production of that electronically stored information unless the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.**<br><br>**(e) If the court orders discovery of electronically stored information that is not reasonably accessible under subsection (d) it may set conditions for discovery of the information, including allocation of the expense of discovery.**<br><br>(f)–(i) * * * | The committee supports the "good cause" standard contained in the proposal that was circulated rather than the suggested balancing test.<br><br>The committee supports the version of subdivision (e) that was circulated rather than this revision that incorporates revised subdivision (d). |



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| | | | | *(For proposed revisions to sections 2031.210, 2031.240, and 2031.310, see those sections.)* | See specific response to comments on sections 2031.210, 2031.240, and 2031.310. |
| 19. | David L. Stanton<br>Partner<br>Pillsbury Winthrop Shaw Pittman, LLp<br>Los Angeles, CA | AM | N | Most troubling of the proposed e-discovery amendments is the fact that they require any party that objects to the discovery of electronically stored information on the ground that it is not reasonably accessible to seek a protective order to preserve that objection. This is the opposite of how inaccessible information is treated under the recent amendments to the Rule 26(b) of the Federal Rule of Civil Procedure. The proposed amendments would eliminate the carefully crafted two-tiered approach to ESI adopted by the Federal Rules. Because all information storage systems have the capacity to hold inaccessible information, for example in slack space, the proposed amendment to Code Civ. Proc. §2031.060 threatens to require discovery motions in almost every action filed in California state court.<br><br>For all of these reasons, I urge the Committee to reconsider the provisions discussed above. *(See also comments under Code Civ. Proc., §§ 2031.010, and 2031.060 and rule 3.724.)* | It is not the intent of the proposed legislation to require any party who objects to seek a protective order. Section 2031.310 on protective orders has been modified to clarify this issue. The committee believes that the proposed approach will be fair, balanced, and efficient; and it will be consistent with California discovery practice and procedure.<br><br>See responses to these other comments. |
| 20. | State Bar of California<br>Committee on Administration of Justice<br>San Francisco, CA | AM | Y | The committee on Administration of Justice (CAJ) recommends that proposed new subdivisions (b) [re-lettered as (c)], (d), (e), | The committee disagreed with these specific recommendations. It does not |



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| | | | | and (f) not be added. CAJ believes that existing discovery law adequately covers the issues addressed by these proposed subdivisions. (See Code Civ. Proc., §§ 2017.020 and 2019.030). There appears to be no need for separate statutory provisions governing ESI discovery that differ slightly from the general statutory provisions. CAJ believes the general standards for obtaining ESI—and protective orders limiting the discovery of ESI—should not be different from those that apply to other forms of discovery. Moreover, proposed subdivisions (b) [re-lettered as(c)], (d), (e), and (f) all deal, in essence, with the concept of undue burden. Under existing law, a showing of undue burden may involve arguments relating to (1) the accessibility of the discovery, (2) the frequency or extent of the discovery, or (3) any number of other issues, not specifically identified in the statutes. All of these arguments can currently be made with respect | think that existing discovery law adequately addresses the issues relating to the discovery of electronically stored information addressed by these new subdivisions. |
| | | | | to ESI, even without the proposed statutory language.<br><br>If subdivision (e) is added, CAJ notes that there is a minor typographical error on the second line: "reasonable" should be "reasonably." | The error has been corrected. |

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| | | | | CAJ questions the need for proposed subdivision (i) in section 2031.060. Section 2031.060 deals with protective orders. The "safe harbor" provisions address a failure to provide ESI that is lost, damaged, altered, or overwritten, an issue that is more likely to arise in the context of motions or orders to compel a response or compliance with a demand. Under the proposed amendments, the "safe harbor" provisions would be added to sections 2031.300, 2031.310, and 2031.320, where the issue is more likely to come up.[2] | Although the "safe harbor" provision is more likely to be applicable under the other statues, it could arise in connection with a motion for a protective order. "Safe harbor" provisions have been added to those sections of the Code of Civil Procedure where they may apply. |
| 21. | TechNet<br>Jim Hawley<br>Senior Vice President and General Counsel<br>Sacramento, CA | AM | Y | The portion of the proposal relating to discovery of inaccessible sources threatens to undermine the policies on which the committee appears to have based the vast majority of the proposal. The proposal departs from the federal rules in its provisions regarding discovery of information from "inaccessible" sources of electronically stored information.[3] As currently drafted, the | Although the proposal does not include this presumption, it provides a balanced, fair, and efficient means for parties to resolve disputes regarding the production of electronically stored information that is not reasonable accessible because |

[2] Under the federal rules, the "safe harbor" is contained in one general rule dealing with the actual failure to provide ESI. Federal Rule of Civil Procedure 37(e) provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

[3] Discovery of information from inaccessible sources is a crucial topic. As discussed in-depth during the process to amend the federal rules, virtually all companies have some inaccessible sources of electronically stored information. For example, a "disaster recovery system is to recover data very soon after relatively rare disasters, [and is generally inaccessible because] backup systems do not constitute and were not designed to serve as archives from which particular documents or finite groups of documents may easily be retrieved, especially over long periods of time." Microsoft Corporation, letter to the Honorable Lee Rosenthal, March 8m, 2004, at 10-13, available at www.kenwithers.com/rulemaking (explaining that businesses regularly duplicate data from servers onto mass storage tapes or other media for purposes of disaster recovery); see

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| | | | | proposal does not include—as the federal rules do—a presumption that "[a] party need not provide discovery of electronically stored information from sources that that party identifies as not reasonably accessible because of undue burden or cost." See Fed. R. Civ. P. 26(b)(2)(B).<br><br>Instead, under the proposal, the only provision that exempts such information from discovery requires a responding party to seek and obtain a protective order. See Proposed Amendment to Cal. Civ. Proc. Code § 2031.060(b). In effect, the proposal requires a responding party to move for a protective order early in the litigation, and essentially requires such motion practice as a routine aspect of *every* litigation. *See Id.*<br><br>This provision turns the federal rules on their head, with serious consequences.<br><br>We believe the procedure for addressing discovery of inaccessible information outlined in the proposal would waste party and judicial resources, undermine the desirable meet-and-confer provisions elsewhere in the proposal, and create the real potential for conflicting results in state and federal courts. | of undue burden or expense.<br><br>It is not the intent of the proposal to require routine use of motions for protective orders. To clarify that objections and motions to compel apply to the discovery of electronically stored information, section 2031.310 has been modified.<br><br>The committee disagrees. When the proposed procedures are used in the California courts, together with other statutory provisions (such as the meet-and-confer requirements relating to motions) and the |

also, comments of Elizabeth Shapiro, U.S. Department of Justice, Fordham conference on electronic discovery, Friday afternoon February 20, 2004, at 53-56 (describing $25 million effort to restore backup tapes which resulted in zero relevant documents). Thus, we know that in most cases the issue of discovery from inaccessible sources will arise.



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | We strongly prefer the approach in the federal rules. The federal rules approach better conserves party and court resources. It also better implements the important policies of promoting early information exchange, meeting and conferring, and exhausting less burdensome discovery from accessible sources before engaging in motion practice regarding inaccessible sources. We urge the Judicial Council to reconsider these provisions and adopt the suggested alternative we set forth below.<br><br>***A. Inefficient Use of Party Resources***<br><br>Apart from the obvious burden imposed by forcing responding parties to move for a protective order in every case, the process in the proposal is inefficient. The proposal omits the federal rules presumption that a party need not produce inaccessible information. See Fed. R. Civ. P. 26(b)(2)(B). Thus, a responding party may only refuse to produce information from inaccessible sources by successfully moving for a protective order. See Proposed Amendment to Cal. Civ. Proc. Code § 2031.060(b). Because parties normally have only 30 days to respond to a request for discovery and a party must move "promptly" for a protective order, a responding party with potentially relevant inaccessible sources must seek a protective order in the early | amended case management rules, parties should be able to fairly and efficiently resolve disputes concerning e-discovery.<br><br>The committee believes that the proposed legislation is a better approach and is more suited to California discovery practice and procedure.<br><br>As explained above, the proposal will **not** force parties to move for a protective order in every case. Furthermore, the proposed process is not inefficient. Through early meet-and-confer sessions, parties often should be able to resolve e-discovery disputes without recourse to filing motions. |



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| | | | | stages of litigation. See Cal. Civ. Proc. Code §§ 2031.060(a), 2031.260.<br><br>In the early stages of litigation, neither the parties nor the court can accurately assess whether "undue burden or expense" makes a source inaccessible in that particular case. The burden or expense of discovery from a particular source cannot be "undue" in a vacuum; the parties and the court must understand that source's marginal utility to the litigation before making a final determination of its accessibility. See Fed. R. Civ. P. 26(b)(2)(B)–(C) (no discovery from inaccessible sources if unreasonably cumulative, obtainable from a less burdensome source or burden or expense outweighs benefit taking into account needs of the case, amount in controversy, parties' resources, importance of the issues at stake, and importance of the proposed discovery in resolving the issues); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (listing similar factors courts should consider when evaluating allocation of cost of discovery from inaccessible sources). A court's | The process under the proposal will enable parties to determine whether e-discovery is needed and, if so, the means to resolve any issues concerning such discovery. The proposal includes provisions enabling the courts to limit the frequency and extent of discovery of electronically stored information if it makes certain determinations, which are similar to those in the federal rules. |
| | | | | determination of whether burden or expense is undue may include consideration of whether similar information is available from an accessible source and whether, even if similar information is not available, the information available from accessible sources is sufficient. *See* Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 | |



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| | | | | amendment ("in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs"). But information from accessible sources cannot be assessed until parties have met and conferred and conducted initial discovery. In complex litigation, where parties produce multiple millions of documents, reviewing information from accessible sources can take many months. In this context, it would waste the parties' resources to argue a motion for protective order at the very outset of the process. That waste would be avoided by adding a presumption similar to that in the federal rules.<br><br>***B. Inefficient Use of Court Resources***<br><br>The proposal would also result in an inefficient use of judicial resources. Its requirement that responding parties bring motions for protective orders in every case involving inaccessible information would create an unnecessarily high volume of motion practice. Parties may otherwise | The proposal includes amendments to the case management rules to provide for early meeting and conferring concerning electronic discovery issues. These will be presented to the Judicial Council in the fall, if the proposed legislation is enacted.<br><br>As indicated above, the proposal will not require motions for protective orders in every case involving inaccessible information. |
| | | | | resolve issues regarding inaccessible electronically stored information through the meet and confer processes elsewhere in the proposal, through the case management conference or through discovery from accessible sources. The proposal bypasses these paths of non-judicial resolution by omitting the guiding presumption in | |



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| | | | | the federal rules and thereby requiring parties to bring early motions to protect inaccessible sources which they cannot easily or inexpensively review. See *McPeek v. Ashcroft*, 212 F.R.D. 33, 35 (D.D.C 2003) (explaining the unorganized state of information on backup tapes). Modifying the proposal to require court involvement only when the issue of discovery from inaccessible sources is fully ripe would save scarce judicial resources.<br><br>***C. Comparative Benefits of the Two-Tier System***<br><br>The federal rules recognize these problems by creating a presumption that a party need not provide discovery from inaccessible sources, and providing a mechanism to address disputes over inaccessibility if and when additional discovery becomes necessary. The federal rules promote efficient and informal resolution of disputes regarding discovery from inaccessible sources by creating this "two-tier" system. In this system, which we recommend the committee adopt, a | The committee believes that the proposed legislation will be fair and efficient. In the California discovery context, it should work better than the two-tier system. (See report.) |



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| | | | | party may designate "inaccessible" sources as off limits to initial discovery by identifying inaccessible sources with "enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment. Thus, a requesting party has sufficient information to evaluate an "inaccessible" designation in addition to the confidence that a responding party must preserve such inaccessible information, if otherwise required to do so. See *Id.*[4] The requesting party then obtains and evaluates information from accessible sources before insisting that the responding party search and produce information contained on inaccessible sources. *See* Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment.<br><br>In the meantime, the parties must meet and confer about electronic discovery issues, including whether to take discovery from inaccessible sources. If resolution of a dispute over accessibility requires court intervention, the parties and the court then can better evaluate the relative burden and marginal utility of discovery from inaccessible sources. | California motion procedures also include meet-and-confer provisions. Additional meet-and-confer provisions on electronic discovery issues will be added to the civil case management rules under proposed rule amendments to be submitted to the Judicial Council in the fall of 2008. |



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| | | | | The two-tiered system of discovery does not eliminate a requesting party's ability to dispute a designation of information as inaccessible; it merely changes the method of resolving such disputes. The federal rules provide a guiding presumption, then require discussion, then permit motion practice by either side. The federal rules encourage discovery of information from accessible sources first so that parties have something of substance to discuss when deciding whether discovery from inaccessible sources is necessary. If all that fails, and it becomes necessary to ask the court to intervene, the federal rules take away the "race to the courthouse" by clearly stating that the burden to show inaccessibility is on the responding party regardless of whether the issue is raised through a motion to compel or a motion for a protective order. *See* Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment.<br><br>Unlike the federal rule process, the proposal currently does not give parties a meaningful chance to resolve their disputes over discovery from inaccessible sources before involving the court. Although parties must include a meet-and-confer declaration with any motion for a | The proposed legislation contains similar provisions relating to the burden to show inaccessibility.<br><br>The committee disagreed with this analysis. The proposed legislation and California discovery law generally (including the statutory meet-and-confer requirements) |

[4] Some have expressed fears that responding parties may improperly designate information as inaccessible. The federal rule authors rejected that argument for good reasons. First, the designation of inaccessible sources differs little from a party's designation of relevant or responsive documents, which the discovery rules permit a party to make in its discretion in the first instance. Second, a party that abuses this discretion will face the risk of sanctions. Third, as a practical matter, parties have no incentive to wall off as inaccessible information they otherwise need to use in the course of business.



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| | | | | protective order, the lack of a guiding presumption means a responding party will often have to bring its motion well before the parties have sufficient knowledge to resolve issues of accessibility. See Proposed Amendment to Cal. Civ. Proc. Code § 2031.060(a). As a result, the meet and confer process will lose effectiveness. Responding parties will less often share details of obligatory protective order motions with opposing counsel before bringing such motions. Requesting parties will have little incentive to negotiate at the proposal's pre-motion meet and confer and will opt instead to leverage against the substantial cost a responding party must incur in bringing its motion. Instead of focusing on the less expensive, and almost always sufficient, accessible sources, parties will expend resources on early, less informed skirmishes aimed at protecting or obtaining inaccessible sources. This outcome appears at odds with the laudable effort to install an early meet and confer process relating to electronic discovery issues.<br><br>We recommend that the proposal be modified to include a balance similar to that contained in the Federal Rules. Given the massive amount of electronically stored information normally available from accessible sources, the proposal should indicate that a party need not provide discovery from inaccessible sources and emphasize discovery from accessible sources first. | provide for the orderly resolution of discovery issues.<br><br>The committee disagreed; it believes the proposed legislation and rules provide a proper balance and a fair, efficient process for resolving disputes. |



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| | | | | As with the federal rules, this process will give force to the parties' discussions regarding accessibility and avoid the cost of unnecessary motion practice. If the parties can focus on accessible information without obligatory early motion practice, they will have an opportunity to be forthright with each other. In this way, the meet-and-confer process has the greatest potential to eliminate or streamline unnecessary discovery disputes and judicial involvement in them.<br>Proposed modification:<br><br>**§ 2031.060**<br><br>(a) * * *<br><br>[(c)] A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought bears the burden of demonstrating the electronically stored information is not reasonably accessible because of undue burden or cost. ~~The party or affected person or organization seeking a protective order regarding the production, inspection, copying, testing, or sampling of electronically stored information on the basis that such information is not reasonably accessible because of undue burden or expense bears the burden of so~~ | The committee does not support the first sentence, which forces parties requesting the information to file motions. The second sentence on burden, based on the federal rules, is already contained in the struck out portion; moreover, the reference to motions to compel does not belong in this section on protective orders. (A similar section on the burden of the responding party has been added to section 2031.310 on motions to compel.) |



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| | | | | ~~demonstrating.~~<br>Proposed addition:<br><br>Committee Note to section 2031.060(b)<br>The volume of—and the ability to search—much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances, the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate. | Because section 2031.060 is statutory, it is not possible to include a note or comment as could be done with a rule. The advice contained in this comment might be provided to litigants by other means. |
| 22. | Union Bank of California<br>Joseph J. Catalano<br>Senior Vice President and Chief Litigation Counsel<br>San Francisco, CA | AM | Y | [Same as comments from Elan Pharmaceuticals, Inc.] | [Same as response to Elan Pharmaceuticals, Inc.] |
| 23. | Hon. Carl J. West | N | N | The existing case law and statutory provisions | The committee disagreed that |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | Judge of the Superior Court of California, County of Los Angeles<br>Los Angeles, CA | | | concerning protective orders and issues of burden and expense are sufficient to address similar issues relating to electronic discovery. The proposed amendments do not address the *Toshiba America* decision or the existing previsions of C.C.P. §2031.280(b). This proposed amendment also introduces the concept of "not reasonably accessible" to the discovery of electronic data—I do not think this is necessary or advisable. In the rapidly changing world of technology what is reasonably accessible today may be buried tomorrow. This is also subject to the argument noted above concerning the adoption of terms used in the federal rules. The existing rules governing the issuance of protective orders to avoid abusive or burdensome discovery will apply to discovery of electronic data. Similar rules are in place to address cost allocation and when considered in light of the *Toshiba America* and *Zubalake* cases, there is ample authority for the courts to deal with these issues. Further rules and statutes are not necessary.<br><br>Existing law concerning the preservation of discoverable information is adequate to address issues that may arise in connection with electronic discovery. The proposed rules will reward companies/litigants who establish electronic information systems that routinely destroy potential evidence. Existing case law dealing with spoliation is adequate to address issues relating to | existing case law and statutory provisions are sufficient to address electronic discovery issues. The federal courts and other state courts have found new provisions regarding e-discovery to be helpful for litigants and the courts. California should provide guidance and direction on e-discovery for its citizens. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | "lost, damaged, altered, or overwritten" electronic data. If the proposed amendments are not intended to "alter any existing obligation to preserve discoverable evidence" then why do we need them. The "safe harbor" provisions in the Federal Rules have generated a great deal of litigation over their interpretation and implementation; I don't think California needs to follow the fed's lead on this. | |
| 24. | Richard Williams<br>Partner<br>Holland & Knight LLP<br>Los Angeles, CA | AM | N | Because of my concerns regarding consistency and predictability, I have deep reservations about the Council's proposed amendment to Cal. Code Civ. Proc. § 2031.060 regarding protective orders. The proposed revision generally tracks the Uniform Rules in providing (1) that a party who has been asked to produce information that is not "reasonably accessible" may seek a protective order to avoid having to produce that information, and (2) that the requesting party may obtain production of that information notwithstanding the objection of the producing party upon a showing by the requesting party of "good cause."<br><br>However, as the "Discussion" section of the Invitation to Comment points out, at page 5, the current proposal for revision of this section of the code does not define the phrase "good cause." This differs from the *Uniform Rules*, which set out a number of factors for the court to consider when contemplating whether to order production of | The committee believes that the commentator's concerns are misplaced for the reasons explained below and in the report.<br><br>The committee supports the "good cause" standard, which is flexible and will allow the law on the discovery of information that is not reasonably accessible to develop. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | inaccessible information. See *Uniform Rules*, Rule 8(c). This also differs from the Federal Rules, which provide, at FRCP 26(b)(2)(C), several factors for the court to consider in ruling upon a motion for a protective order, including whether the information sought is obtainable from another source, and whether the burden or expense of obtaining the information outweigh the likely benefit of the information. In addition, the commentary to the Federal Rules provides seven factors for a court to consider when making its "good cause" analysis. See Federal Rules, Committee Notes, FRCP 26(b)(2).<br><br>I am concerned about the absence of any guidance in the proposed revisions to Cal. Code Civ. Proc. § 2031.060 on the issue of what constitutes "good cause." In particular, I am concerned that the decision not to incorporate any of the factors set out in the Uniform Rules and the Federal Rules will be interpreted by the courts as signifying rejection of those factors by the Council and legislature. Without some direction from the Council as to what factors are relevant to the determination of "good cause," significant disparities and inconsistencies will surely develop as California state courts interpret and apply the new rules. In addition, the ideals of consistency and predictability will be frustrated if counsel is unable to use decisions of the federal courts and other state courts to give sound advice to their | The proposed legislation includes provision for limitations on discovery similar to these in FRCP 26(b)(2)(C).<br><br>The fact that the factors are not being codified is not intended to preclude courts from considering them in determining "good cause." |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | clients as to likely outcomes.<br><br>I urge the Council to incorporate the factors set out in the Uniform Rules at Rule 8(c) into the revisions to Cal. Code Civ. Proc. § 2031.060 as a definition of "good cause," or at the least to add commentary to the rule expressing approval of these factors, and the factors set out in the Committee Notes to FRCP 26(b)(2), as guidance on the issue of what constitutes "good cause" for ordering the production of inaccessible electronic information. | |
| **C.C.P., § 2031.080.** | | | | | |
| | No specific comment on this code section | | | | |
| **C.C.P., § 2031.210. Response to demand** | | | | | |
| 1. | Michael S. Simon<br>Akerman Senterfitt LLP<br>Attorneys at Law<br>Los Angeles, CA | AM | N | Michael S. Simon proposes the revisions in bold to section 2031.210:<br><br>**§ 2031.210**<br>(a) The party to whom a demand for inspection, copying, testing, or sampling demand has been directed shall respond separately to each item or category of item by any of the following:<br>(1) A statement that the party will comply with the particular demand for inspection, copying, testing, or sampling and any related activities.<br>(2) A representation that the party lacks the ability to comply with the demand | See also responses to Simon's general comments and his comments under section 2031.060. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | for inspection, copying, testing, or sampling of a particular item or category of item.<br>(3) An objection to the particular demand for inspection, copying, testing, or sampling. **For electronically stored information, such objections may include, but are not limited to an objection that the requested electronically stored information is not reasonably accessible because of undue burden or expense.**<br>(b)-(c) * * * | The committee did not think that it is appropriate to include this substantive set of objections in C.C.P. § 2031.210 which prescribes the form in which responses shall be made. This does not mean that such objections cannot be made in appropriate circumstances. |
| 2. | State Bar of California<br>Committee on Administration of Justice<br>San Francisco, CA | AM | Y | The Committee on Administration of Justice (CAJ) recommends that subdivision (a)(4) be added, to read as follows*:* "An objection to the form of production." This additional provision is needed to make the response to an inspection demand consistent with the other new provision in section 2031.030, which permits a party demanding inspection to specify the form in which each type of ESI is to be produced. | The committee did not think that it is appropriate to include this substantive set of objections in C.C.P. § 2031.210 which prescribes the form in which responses shall be made. This does not mean that such objections cannot be made in appropriate circumstances. |
| **C.C.P., § 2031.220. Statement of compliance** | | | | | |
| | No specific comments on this code section | | | | |


Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| **C.C.P., § 2031.230. Statement of availability to comply** | | | | | |
| | No specific comments on this code section | | | | |
| **C.C.P., § 2031.240. Partial objection to demand** | | | | | |
| 1. | Michael S. Simon<br>Akerman Senterfitt LLP<br>Attorneys at Law<br>Los Angeles, CA | AM | N | Mr. Simon proposes the revisions in bold to section 2031.240:<br><br>**§ 2031.240**<br><br>(a) * * *<br><br>(b) If the responding party objects to the demand for inspection, copying, testing, or sampling of an item or category of item, the response shall do both of the following:<br><br>(1) Identify with particularity any document, tangible thing, or land, or electronically stored information falling within any category of item in the demand to which an objection is being made.<br><br>**(C)** Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Chapter 4 (commencing with section 2018.010), that claim shall be expressly asserted. **If an objection to a demand for** | The committee did not think |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | **electronically stored information is based upon a claim that such information is not reasonably accessible because of undue burden or expense, that claim shall be expressly asserted.** | that this specific substantive objection should be included in this section on the form of partial objections. This does not mean that such an objection may not be made in appropriate circumstances. |
| 2. | State Bar of California<br>Committee on Administration of Justice<br>San Francisco, CA | AM | Y | The Committee on Administration of Justice (CAJ) recommends that proposed subdivision (b) of section 2031.280 be moved to this section, and added as subdivision (c). Section 2031.240 governs objections, and proposed section 2031.280(b) more appropriately fits in section 2031.240. | The committee disagreed; it has left (b) in section 2031.280. |
| **C.C.P., § 2031.250. Signatures** | | | | | |
| | No specific comments on this code section | | | | |
| **C.C.P., § 2031.260. Time to respond** | | | | | |
| | No specific comments on this code section | | | | |
| **C.C.P., § 2031.270. Extension of time to respond** | | | | | |
| | No specific comments on this code section | | | | |

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Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

**Electronic Discovery: Legislation** (amend Code Civ. Proc., §§ 2016.020, 2031.010–2031.060, 2031.210–2031.280, and 2031.290–2031.320; add Code Civ. Proc., §§ 1985.8 and 2031.285)

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| **C.C.P., § 2031.280. Form of response** | | | | | |
| 1. | California Commission on Uniform State Laws<br>Pamela Winston Bertaini<br>Commissioner<br>Sacramento, CA | A | Y | 1. Code Civ. Proc., § 2031.280(c)<br>The California Commission requests clarification regarding whether §2031.280(c) requires modification when read in light of §2031.280(a).<br><br>2. Code Civ. Proc., § 2031.280(e)<br>The California Commission requests clarification regarding application of the expense provision in §2031.280[(e)] in light of §2031.060(e) and (f). | 1. Code Civ. Proc., § 2031.280(c)<br>Subdivision (c) applies and modifies the requirements of (a) specifically for electronically stored information; the statute does not need to be clarified.<br><br>2. Code Civ. Proc., § 2031.280(e)<br>Section 2031.280[(e)] deals with who bears the expense of translating data compilations into usable forms, whereas sections 2031.060(e) and (f) are broader. They allow the court to set conditions (including allocating costs) and impose limitations relating to the discovery of electronically stored information from sources that are not reasonably accessible. |
| 2. | Elan Pharmacuticals, Inc.<br>Perry S. Goldman<br>Vice President, Legal–Litigation<br>South San Francisco, CA | AM | Y | The federal rules and the uniform rules both discuss a "form or forms" of production. In acknowledging there may be multiple forms of production, drafters of both the federal and state rules recognized that "different forms of production may be appropriate for different types | The word "form" has been replaced by "form or forms," as suggested. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | of electronically stored information." FRCP Rule 34, Committee Note. It appears from proposed section 2031.280(b), which requires a responding party to state "the form in which it intends to produce each type of information," that the committee also recognized the possibility that different forms of production would be suitable for different types of electronically stored information. We suggest a reference to "form or forms" of production in the California rules would make this point more clear. | |
| 3. | Genentech, Inc.<br>Todd Kaufman<br>Director, State Government Affairs | AM | N | The federal rules and the uniform rules both discuss a "form or forms" of production. In acknowledging there may be multiple forms of production, drafters of both the federal and state rules recognized that "different forms of production may be appropriate for different types of electronically stored information." FRCP Rule 34 Committee Note. It appears from proposed section 2031.280(b), which requires a responding party to state "the form in which it intends to produce each type of information," that this Committee also recognized the possibility that different forms of production would be suitable for different types of ESI. We suggest a reference to "form or forms" of production in the California rules would make this point more clear. | See response to previous comment. |



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| 4. | San Francisco City Attorney's Office<br>Margaret Baumgartner<br>Deputy City Attorney<br>San Francisco, CA | AM | Y | A. Providing Electronic Discovery in Native Format When Held on Proprietary Software May Violate Software Agreements<br>The proposed addition of subsection (c) to Code of Civil Procedure § 2031.280 provides that where a requesting party does not specify a form for production of ESI, the responding party "shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably useable" unless "the parties otherwise agree or the court otherwise orders." A number of City departments use proprietary software systems to create and maintain their electronic data, pursuant to licensing agreements that prohibit the City from distributing the software or any part of it to third parties. Because data created with proprietary software often cannot be severed from the software itself, producing data in the form in which it is maintained discloses the software itself, which may violate agreements with software vendors. However, the data can often be transferred to an alternative format without loss of important information.<br><br>B. Recommendation<br><br>The City Attorney recommends that this subsection specifically except from this provision data kept by proprietary software. | The committee believes that issues related to proprietary software can be resolved within the framework of the existing |


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| | | | | | and the proposed new law. However, to clarify this issue, it supports including in the legislative history a comment similar to that contained in the Advisory Committee Note to Fed. Rule Civ. P. 34(a)(1). |
| 5. | State Bar of California<br>Committee on Administration<br>Of Justice<br>San Francisco, CA | AM | Y | The Committee on Administration of Justice recommends that subdivision (b) be moved to section 2031.240. Subdivisions (c) and (d) would then become (b) and (c). | The committee disagreed; subdivision (b) belongs in its current location. |
| 6. | TechNet<br>Jim Hawley<br>Senior Vice President and General Counsel<br>Sacramento, CA | AM | Y | The proposal adopts nearly all of the federal rules' provisions governing form of production. However, the proposal fails to clarify that the default forms of production in the proposed amendments apply when a "form of production is not specified by party agreement or court order." As currently written, the proposal could be interpreted to limit default forms of production to situations in which "a demand for production does not specify a form." See Proposed Amendment to Cal. Civ. Proc. Code 2031.280(c)(1). This interpretation would create ambiguity for litigants and the courts. We urge the committee to adopt, in line with the federal rules, explicit language stating that the default forms of production apply whenever a form is not specified by party agreement or court order. See Fed. R. Civ. P. 34(b) advisory committee's note to 2006 | The proposal includes a default form or forms. (See Code Civ. Proc., § 2031.280(d)(1).) This version should operate effectively within the context of California's discovery procedures. Subdivision (d) includes a prefatory clause: "Unless these parties otherwise agree or the court orders." |


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| | | | | amendment.<br><br>Proposed modification:<br><br><u>Committee Note to section 2031.280(c)</u><br><u>If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.</u> | Proposed Code of Civil Procedure section 2031.280(d)(1) already contains a similar provision. |
| 7. | Union Bank of California<br>Joseph J. Catalano<br>Senior Vice President and Chief Litigation Counsel<br>San Francisco, CA | AM | Y | [Same as the comment from Elan Pharmaceuticals, Inc.] | [Same as response to Elan Pharmaceuticals, Inc.] |
| **C.C.P., § 2031.285. Electronic discovery: Claim of privilege or work product** | | | | | |
| 1. | California Defense Counsel<br>Edith R. Matthai<br>President<br>Sacramento, CA | A | Y | Proposed new Code of Civil Procedure section 2031.285 contains critical and well-crafted "clawback" provisions for cases when privileged information is produced, protecting the information until the court can resolve the claim of privilege. | The commentator's support for the provision is noted. |
| 2. | Thomas Green<br>Assistant Attorney General<br>State of California, Department of Justice<br>Sacramento, CA | AM | N | The provisions concerning inadvertent disclosure of privileged information should recognize the obligations of counsel under *State Compensation Ins. Fund v. WPS Inc.* (1999) 70 Cal.App.4th 644. | The provisions do not need to expressly incorporate the substantive law on the obligations of counsel. |
| | | | | Proposed amendments to Code Civ. Proc., | The proposed statute simply |



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| | | | | § 031.285(a) impose an obligation upon parties to notify opposing parties of any inadvertent disclosure of privileged information. Upon notification, the party receiving the notice must take specified steps to protect and sequester the information subject to the notice. Code Civ. Proc., § 2031.285(b). It is important to understand that this may understate counsel's ethical obligations upon receipt of privileged information. According to *State Compensation Ins. Fund v. WPS Inc.* (1999) 70 Cal.App.4th 644, 656–657.<br><br>When a lawyer receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention as | provides a procedure for resolving claims that privileged documents have been produced; it does not purport to state or codify, or in any way change, counsel's ethical obligations upon the receipt of privileged documents. |



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| | | | | may be justified.<br><br>One might argue that the effect of the committee's language triggering a duty to sequester upon notice replaces the *State Fund*—articulated obligation to sequester and take other steps when the privileged nature of the material has been or should have been recognized, irrespective of notice.<br><br>Assuming the committee is not overturning *State Fund*, it may wish to consider amending proposed section 2031.285(b) to read:<br><br>Upon recognition of the privileged nature of any electronically stored information produced by another or receipt of a notice under subsection (a), a party that received the information shall immediately sequester… | As indicated above, it is not the intent of section 2031.285 to alter the law regarding attorneys' obligations with respect to the inadvertent disclosure of privileged information. Rather, the new statute would establish a procedure for handling electronically stored information produced in discovery that may be subject to a claim of privilege or work product protection, but the claim is disputed. The committee recommends leaving the language as it is to deal with such claims. |
| 3. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | Does not mimic the claw-back and quick peek provisions of the Federal Rules of Civil Procedure. I'm not sure I am comfortable with either one, but any proposal should at least address some method of production that does not result in inevitable loss. | The proposal is based on NCCUSL Rule 9. It provides a method to resolve claims of privilege or work product protection relating to electronically stored information that has been produced in discovery. |
| 4. | Lawrence R. Ramsey | A | Y | Proposed new Code of Civil Procedure section | The committee agrees with this |



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| | Bowman and Brooke LLP<br>Gardena, CA | | | 2031.285 contains critical and well-crafted "clawback" provisions for cases when privileged information is produced, protecting the information until the court can resolve the claim of privilege. | comment. |
| 5. | Richard L. Seabolt<br>Duane Morris LLP<br>San Francisco, CA | AM | N | Proposed section 2031.285 largely tracks a practice that I and many others have adopted for years by stipulated Case Management Order with respect to inadvertently produced privileged information. In my view, it is important to establish a procedure to address the issues that result when a privileged or protected document is mistakenly produced.<br><br>But the current California proposal in my view inappropriately puts the burden of making the motion to address the issue on the receiving party, not the producing party, and compounds the problem by imposing a 30-day time limit for the receiving party to make the motion. (See proposed section 2031.285(c)–(d).)<br><br>Even though a receiving party has an ethical obligation to notify and return inadvertently produced documents under the *Rico v. Mitsubishi* case, the producing party still has an obligation to take appropriate steps to avoid waiver of its privileges by conducting a privilege review of its documents before they are produced. Because the issue arises only when the producing party fails to | The current proposal is derived from NCCUSL Rule 9. It provides a procedure for dealing with electronically stored information produced in discovery and subject to a claim of privilege or protection. This procedure does not determine issues of substantive law. The reporter's notes to the NCCUSL rule state: "The rule does not address whether the privilege or protection that is asserted after production was waived by the production or ethical use of such data. These issues are left |



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| | | | | perform a sufficiently thorough review, it is only fair that it should be the producing party that should bear the burden of filing the motion to correct the problem that it created.<br><br>The 2006 Notes of Advisory Committee accompanying the e-discovery Federal Rules emphasize that, although the producing party is provided some protection under the "clawback" provisions, the producing party still faces some obligations if it wishes to avoid waiver problems:<br><br>"Courts will continue to examine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made as a reasonable time when delay is part of the waiver determination under the governing law."<br><br>Whenever the "clawback" provisions are invoked by the producing party to retrieve privileged or protected information, it seems to me that it is the producing party that should show that the information was privileged or protected initially and not waived, that it took reasonable measures to preserve the confidentiality of the privileged or protected information during the document production and that it acted within a reasonable time after discovery of the inadvertent production | to resolution by other law or authority." The proposed statute is intended to work in this same manner.<br><br>California courts also will continue to consider these issues in connection with motions under section 2031.285.<br><br>The committee agrees that the producing party will have the burden to show that the information is privileged or protected and not waived. This does not mean that the proposed procedure should be changed. If the producing party claims information produced is privileged and the receiving |



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| | | | | to implement the "clawback" notice procedures. In my view, such matters should be addressed by the producing party in the producing party's initial motion papers.<br><br>In short, I believe that it is the producing party that should be required to make the motion that presents the issue to the court, because: (1) it is the producing party that was in the position to take measures to avoid the problem, and, thus, should be saddled with the burden of making the motion; and (2) it is the producing party that should address initially some of the factual issues that are central to the resolution of the dispute. | party agrees to return the information as part of its ethical obligation, the privileged information will be returned and there will be no dispute. However, when the providing party provides privileged or protected information and the party receiving the information objects to its return, a dispute may ensue. In that situation, the receiving party will have a better idea of why it is refusing to return the information. Hence, the statute (based on NCCUSL Rule 9) properly puts the burden on the receiving party to bring the motion. |
| 6. | State Bar of California<br>Committee on Administration of Justice<br>San Francisco, CA | | | The Committee on Administration of Justice (CAJ) discussed these proposed new provisions at length, and reached the following conclusions:<br><br>(1) The intended scope of the proposed new provisions is not clear. The Discussion section of the memorandum preceding the proposed statutory changes notes that that the new provisions are intended to deal with "the *inadvertent* disclosure of privileged or protected information…" (Emphasis added). Yet the | The language of the statute is not limited to inadvertent disclosure. Depending on the applicable law and facts, the issue of waiver may or may not be dispositive in a particular case. As the CAJ correctly |



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| | | | | proposed statutory language goes further and, on its face, covers *any* ESI produced in discovery that is subject to a claim of privilege or of protection as attorney work product.<br><br>CAJ recognizes that proposed section 2031.285 would establish a *procedure*, and that the court will ultimately need to rule on the *substance* of questions relating to privilege, inadvertence, and waiver. At the same time, CAJ believes the intended scope of the new provisions should be clarified.<br><br>During the development of Federal Rule of Civil Procedure 26(b)(5)(B)—the equivalent federal rule—there was a great deal of discussion about "claw back" and "quick peek" agreements, two types of agreements designed to save time and expense in privilege reviews and minimize the risk of waiver if privileged material is produced. Definitions of "claw back" and "quick peek" agreements vary. Either may involve an agreement that allows the parties to forego privilege review entirely. Under a "claw back" agreement, the parties agree that production of privileged material will not constitute a waiver, and the requesting party agrees to return the privileged material upon receipt of notice from the responding party. Under a "quick peek" agreement, the responding party makes | recognizes, this new statute provides a *procedure* for resolving claims relating to the production of electronically stored information subject to claims of privilege or attorney work product protection. Courts will need to resolve the *substantive* questions relating to privilege, inadvertence, and waiver. |



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| | | | | requesting party designates the documents it wishes to have produced. The responding party then reviews the designated documents for privilege, prior to actual production.<br><br>Both of these situations differ from the classic "inadvertent" disclosure situation, where there is no agreement between the parties, a privilege review is undertaken before the documents are produced, and one or more documents subject to a claim of privilege or work product protection "slips through" the review. Yet a fourth scenario involves the *intentional* (or select) waiver of privilege with respect to certain material.<br><br>If, in fact, section 2031.285 is intended to apply to claims of "inadvertent" disclosure only, CAJ believes the statutory language should be clarified.<br><br>(2) Some members of CAJ believe section 2031.285 *should* cover claims of "inadvertent" disclosures only—even if that was not the intent of the drafters. Others believe the provisions should be more open-ended, to cover situations that may not be deemed to constitute an "inadvertent" disclosure.[5] | As explained above, section 2031.285 simply provides a procedure for resolving disputes. It is not limited to issues relating to inadvertent disclosure |

[5] There are many open questions relating to "inadvertent" disclosure and "waiver" under claw back and quick peek agreements that have not been tested. The proposed statutory revisions may implicitly promote the use of such agreements, notwithstanding these open questions.



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| | | | | (3) Proposed section 2031.285 uses the term claim of "privilege." The language is not limited to the attorney-client privilege, and CAJ understands that the intent is to cover any statutory privilege. However, the term "privilege" is often understood to be *limited* to privileges that are defined in the Evidence Code, and CAJ believes the language should be expanded to be broad enough to cover non-statutory protections such the constitutional right to privacy.<br><br>Proposed subdivision (a) imposes no time constraint on the party making a claim of privilege. CAJ believes that some time constraint would be appropriate, such as that the claim of privilege must be made "promptly" after the party learns of the disclosure of privileged information.<br><br>Proposed section 2031.285 is limited to electronically stored information. CAJ believes the new provisions (if adopted) should be applicable to *all* types of discovery. Although ESI may be greater in volume than paper discovery in some circumstances, the disclosure of privileged information may occur in paper discovery as well.[6] As a matter of principle, there is nothing unique about ESI that should | This is not necessary; the language in the statute is broad.<br><br>The statute establishes a 30-day time limit on the receiving party to bring a motion.<br><br>The committee concluded that this proposal to expand the statute to all forms of discovery is beyond the scope of the proposal that was circulated for comment. |

[6] In some circumstances, it may be *easier* to conduct a privilege review of ESI, to the extent the documents are electronically searchable.



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | result in a separate statutory scheme governing claims of privilege, work product, and waiver. | |
| 7. | Superior Court of California,<br>County of Los Angeles<br>Los Angeles, CA | AM | Y | The proposed procedure for dealing with the inadvertent production of information that is claimed to be privileged or work product, as set forth in proposed C.C.P. § 2031.285, appears to conflict with existing Evidence Code provisions. If these revisions are made to the Code of Civil Procedure, the Evidence Code should be amended accordingly. Amendments to the Federal Rules of Evidence are under consideration now to address this same issue concerning the amendments to the Federal Rules of Civil Procedure concerning electronic discovery.<br><br>Additionally, C.C.P. § 2031.285 only addresses the obligations of a party who receives privileged information, and then receives a "notification of privilege" from the party who produced the information. It does not address whether the production of privileged information as part of a document production with "quick peeks" or "claw back provisions" is deemed to be "inadvertent" so that the obligations of the receiving lawyer set forth in *Rico v. Mitsubishi* (2007) 42 Cal.4th 807 apply. | The proposed procedure does not appear to be in conflict with, and does not address, issues of substantive law that are in the Evidence Code.<br><br>The commentator is correct: the proposed statute does not address the substantive issues identified. |
| 8. | Superior Court of California,<br>County of Ventura<br>Keri Griffith | AM | Y | In section 2031.285(b), for consistency, I suggest using the word "lodge" instead of "present," so that the section provides "lodge the information | The committee disagreed. The proposed change would eliminate the idea of bringing a |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | Senior Manager East County Courthouse<br>Simi Valley, CA | | | with the court conditionally under seal for a determination of the claim." | motion, which is important. |
| 9. | Hon. Carl J. West<br>Judge of the Superior Court of California, County of Los Angeles<br>Los Angeles, CA | N | N | Adoption of civil discovery statutes addressing privilege issues seems inappropriate. Proposals to amend the Evidence Code privilege provisions should be addressed to the Evidence Code and not the Code of Civil Procedure. Adopting a privilege exceptions providing a "quick peek" or "clawback" procedures as proposed by [section] 2031.285 will not advance the world of e-discovery, will not simplify e-discovery, and will most certainly lead to greater work loads for the trial courts that have to address disputes over the implementation of the section. The proposed section essentially relaxes the waiver concept for inadvertent production—a concept that is already established in the case law. Similarly, to the extent the proposed rule imposes guidelines for lawyers conduct, such issues are already dealt with by the rules of professional conduct.<br><br>Claims of privilege and work product protection are addressed above. It is my view that establishing special rules for privilege issues in connection with electronic data is neither necessary nor advisable. | The statute provides a procedure for resolving privilege issues; this is appropriate. The statute belongs on the Code of Civil Procedure, not in the Evidence Code. The proposed procedural statute does not adopt any substantive privilege exceptions or address lawyers' ethical obligations.<br><br>The committee disagreed with this interpretation of the purpose or content of proposed new section 2031.2085. |
| **C.C.P., § 2031.290. Retention of demand** | | | | | |
| | No specific comments on this code section. | | | | |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

**Electronic Discovery: Legislation** (amend Code Civ. Proc., §§ 2016.020, 2031.010–2031.060, 2031.210–2031.280, and 2031.290–2031.320; add Code Civ. Proc., §§ 1985.8 and 2031.285)

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| **C.C.P., § 2031.300. Untimely response: Safe harbor** | | | | | |
| 1. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | Probably an improvement. Broadens the federal "lost" harbor to include lost, damaged, altered, or overwritten data. | The committee agreed that this is an improvement. |
| 2. | Richard L. Seabolt<br>Duane Morris LLP<br>San Francisco, CA | AM | N | The new proposal in proposed section 2031.300(d) contains a "safe harbor" provision that tracks Federal Rule 37(e), but wisely adds an additional sentence: "This subdivision shall not be construed to alter any existing obligation to preserve discoverable information." Despite this additional language, I believe the proposed section still may be misread so readers may believe that there is more of a "safe harbor" than is intended. The 2006 Notes of Advisory Committee that accompany Federal Rule 37 address that risk by, among other things, stating that<br><br>A party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserved. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." | At the suggestion of another commentator, the word "existing" has been deleted from the safe harbor provision in section 2031.300(d). |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | Somewhat similarly, the Federal Judicial Center 2007 publication "Managing Discovery of Electronic Information: A Pocket Guide for Judges" states at page 20:<br><br>Good faith may require, among other things, a party to modify or suspend certain features of the electronic information system to prevent the loss of information subject to preservation, and it may preclude a party from exploiting the routine operation of the system to thwart the party's discovery obligations.<br><br>No similar language will appear with the proposed new California provision. I suggest that the proposed statutory language be supplemented to make more explicit some of the duties that parties have to preserve evidence with litigation and/or an associated discovery request are reasonably anticipated. Language similar to the language in the quote immediately above could be added to the proposed statutory language. Alternatively, the last sentence could be supplemented to track the view of the California Supreme Court in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12, which stated that "Destroying evidence in response to a discovery request after litigation has commenced would surely be a misuse of discovery within the meaning of section 2023, as would such | The committee regards the proposed language, which is similar to that in the federal rule, as sufficient for the statute. Because statutes are generally not accompanied by notes or comments, it is not feasible to include the federal comments in the legislation itself; however, courts and attorneys may look to those comments and other sources for guidance. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | destruction in anticipation of a discovery request." The statute could be supplemented as follows.<br><br>"This subdivision shall not be construed to alter any existing obligation to preserve discoverable information, including an obligation to preserve information if the party reasonably anticipates that the information may be requested in litigation."<br><br>Regardless of exactly how the limitation on the "safe harbor" provision is expressed, it seems important to include some language that indicates that the "safe harbor" provision has little or no ongoing significance once a dispute has arisen and litigation has commenced. At that point, the party and its counsel have a responsibility to assure that electronically stored information, like all potential evidence, is preserved, not destroyed. In light of cases like the recent *Qualcomm v. Broadcom* opinion, it seems particularly important that the "safe harbor" provision not be misinterpreted and become a trap for the unwary litigator. See also "E-Discovery: Understanding the Safe Harbor Provision: Finding safe harbor in a leak proof vessel: the importance of document and data retention policies and rule 37(f)" February 2, 2007 Duane Morris Alerts (*http://www.duanemorris.com/alerts/alert2422.html*). | The committee does not support adding the underlined language. The general statement of the law is preferable. Specific applications will be developed on the basis of individual cases.<br><br>The last sentence clarifies the safe-harbor provision: "This subdivision shall not be construed to alter any obligation to preserve discoverable information." |
| 3. | State Bar of California | AM | Y | The Committee on Administration of Justice | The committee agreed with this |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | Committee on Administration of Justice<br>San Francisco, CA | | | (CAJ) recommends that the word "existing" be removed from the second sentence of subdivision (d) to eliminate confusion as to time frame. The word should also be removed in other places where the "safe harbor" provision is proposed to be added (sections 2031.060(i), 2031.310(f), and 2031.320(d)).<br><br>A minority of CAJ believes this provision should be removed in its entirety because it is unnecessary. The court can already consider a party's "good faith" and the other safe harbor factors on a motion to compel or other discovery motion. | suggestion and has removed the word "existing" from the safe harbor statutes.<br><br>The committee disagreed with the minority view. It believes the safe harbor provisions are helpful to litigants and clarify the law. |
| | **C.C.P., § 2031.310. Motion to compel; Safe harbor** | | | | |
| 1. | California Commission on Uniform State Laws<br>Pamela Winston Bertaini | A | Y | Comments are invited regarding whether any additions or modifications to the statute on motions to compel are needed to address the discovery of electronically stored information. The California Commission recommends that §2031.310 (the statute on motions to compel) be amended to address the discovery of electronically stored information in accord with proposed amendments to the protective orders statute (§2031.060).<br><br>Specifically in this regard, the provision on burden reflected in proposed subdivision (b) of §2031.060, which is based on Rule 8(b) of the *Uniform Rules Relating To The Discovery Of* | The committee agreed with this suggestion. Therefore, the committee has substantially modified section 2031.310 on motions to compel to operate in a parallel manner with section 2031.060 on motions for protective orders. As under other California law, the bringing of motions to compel will be an alternative to motions for a protective order in disputes over the production of electronically stored information. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | *Electronically Stored Information* prepared by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), should be incorporated into §2031.310. Such amendments to §2031.310 will be consistent with the Federal Rules of Civil Procedure revisions addressing electronic discovery that became effective December 1, 2006. Moreover, amending §2031.310 to address discovery of electronically stored information, as provided in the proposed amendments to §2031.060, will promote analytical parity, as many objections to discovery made with respect to protective orders are similar or identical to discovery objections made in the context of motions to compel. | |
| 2. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | Probably an improvement. Broadens the federal "lost" harbor to include lost, damaged, altered, or overwritten data. | The committee agreed that this is an improvement. |
| 3. | Michael S. Simon<br>Akerman Senterfitt LLP<br>Attorneys at Law<br>Los Angeles, CA | AM | N | Mr. Simon proposes the changes in bold:<br><br>**§ 2031.310**<br><br>(a) On receipt of a response to an <u>a demand for</u> inspection<u>, copying, testing, or sampling</u> demand, the party demanding an inspection may move for an order compelling further response to the demand if the demanding party deems that any of the following apply: | See also response to Mr. Simon's general comments and comments under section 2031.060.<br><br>The committee agreed with Mr. Simon's general point. Proposed section 2031.310 (in motions to compel) has been revised to include provisions relating to the discovery of |



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| | Commentator | Position | Comment on behalf of group? | Comment | Committee Response |
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| | | | | (1) A statement of compliance with the demand is incomplete.<br>(2) A representation of inability to comply is inadequate, incomplete, or evasive.<br>(3) An objection in the response is without merit or too general. | electronically stored information parallel to those in proposed section 2031.030 (on motions to compel). However, the committee has revised the statute in a different manner than by the commentator suggests. |
| | | | | **(4) An objection to the production of electronically stored information as not reasonably accessible because of undue burden or expense is without merit or the party's need for the electronically stored information outweighs the burden or expense.** | The committee does not support adding subdivision (a)(4). Unlike (a)(1)–(3), it contains substantive elements relating to a specific type of objection; these should be located elsewhere. |
| | | | | (b) * * * | |
| | | | | **(c) For a motion under subdivision (a)(4) the responding party bears the burden to show that the demanded electronically stored information is not reasonably accessible because of undue burden or expense and the moving party bears the burden to show that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the** | The committee has included some of the elements from this suggested subdivision in proposed new section 2031.310(d). However, the explicit balancing test is not included. Instead, the "good cause" standard that the moving parts must satisfy has been used in new section 2031.310(e). |



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| | | | | **requested discovery in resolving the issues.**<br><br>**(d) If the court orders discovery of electronically stored information that is not reasonably accessible under subsection (c) it may set conditions for discovery of the information, including allocation of the expense of discovery.**<br><br>**~~(c)~~(e)** * * *<br><br>**~~(d)~~(f)** * * *<br><br>**~~(e)~~(g)** * * *<br><br>**~~(f)~~(h)** | A version of this provision, based on NCCUSL Rule 8(d), has been placed in new section 2031.310(f). |
| 4. | State Bar of California<br>Committee on Administration of Justice<br>San Francisco, CA | AM | Y | The Committee on Administration of Justice (CAJ) recommends adding a fourth provision to subdivision (a), as follows, to make this section consistent with other proposed provisions relating to ESI: "(4) The electronically stored information demanded will not be or has not been produced in an acceptable format or will otherwise be insufficiently produced." | The committee disagreed with this suggestion. Subdivisions (a)(1)–(3) deal in general with types of responses that are inadequate and require further responses. Proposed (4) is too specific. The objections under (4) might be brought under one of the previous categories. |

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| 5. | TechNet<br>Jim Hawley<br>Senior Vice President and General Counsel<br>Sacramento, CA | AM | Y | Proposed modifications are in bold.<br>**§ 2031.310**<br><br>(a) On receipt of a response to a demand for inspection, copying, testing, or sampling, the party demanding an inspection may move for an order compelling further response to the demand if the demanding party deems that any of the following apply:<br><br>(1) A statement of compliance with the demand is incomplete.<br>(2) A representation of inability to comply is inadequate, incomplete, or evasive.<br>(3) An objection in the response is without merit or too general.<br>**(4) After meeting and conferring, and reviewing information reasonably available from accessible sources, the parties dispute the accessibility of additional sources and/or the need for discovery from such additional sources.**<br>…<br>(c) **Except in the case of a motion based on subsection (a)(4),** unless notice of this motion is given within 45 days of the service of the response, or any supplemental response, or on or before any specific later date to which the demanding party and the responding party have agreed in writing, the demanding party waivers any right to compel a further response | The committee does not support adding subdivision (a)(4) and the new clause at the beginning of (b). Unlike (a)(1)–(3), these contain substantive elements relating to a specific set of disputes. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | (d) * * * * | |
| **C.C.P., § 2031.320. Failure to produce** | | | | | |
| 1. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | Probably an improvement. Broadens the federal "lost" harbor to include lost, damaged, altered, or overwritten data. | The committee agreed that it is an improvement. |
| 2. | State Bar of California<br>Committee on Administration of Justice<br>San Francisco, CA | AM | Y | See comments to section 2031.300. | See response to comments under section 2031.300. |
| **C.C.P., § 1985.8. Subpoena for electronically stored information** | | | | | |
| 1. | California Commission on Uniform State Laws<br>Pamela Winston Bertaini<br>Commissioner<br>Sacramento, CA | A | Y | 1. The California Commission requests clarification regarding application of the expense provision in §1985.8(g) [circulated as (e)] in light of §2031.060(e) and (f).<br><br>2. As a matter of drafting style, the California Commission recommends the following revisions:<br><br>§ 1985.8 (a): Cite to a specific Article or Chapter of the Code of Civil Procedure and omit the "et seq." reference;<br>§1985.8 (b): Replace the word "must" with the | 1. Section 1985.8(g) [circulated as (e)], like current section 2031.280(c), deals with who is responsible for the expense of translating data compilations. Section 2031.060(e) and (f) are broader. They involve setting conditions and limiting discovery, as well as allocating the expense of discovery.<br><br>2. The committee responses are:<br><br>The committee agreed; the reference has been changed.<br><br>The committee disagreed; the subdivision has been changed, |



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| | | | | word "shall";<br><br>§1985.8 (f): Strike the phrases "the provisions of" and "et seq." and cite a specific Article or Chapter of the Code of Civil Procedure. | but to use "may" instead of "must."<br><br>The committee has deleted this entire subdivision. |
| 2. | William N. Kammer<br>Partner<br>Solomon Ward Seidenwurm & Smith<br>San Diego, CA | AM | N | The provisions [on the form of production] are probably an improvement. Basically the responding party controls the form. Because the problems in e-discovery basically concern the scope and form of the production, this is a reasonable provision. | The committee agreed they are an improvement. |
| 3. | State Bar of California<br>Committee on Administration<br>of Justice<br>San Francisco, CA | AM | Y | The Commission on Administration of Justice (CAJ) recommends the following changes to this section to address drafting and other issues that are raised. For example, the section refers to the subpoenaed person as a "party," whereas section 1985 refers throughout to the "witness" or the "person" being subpoenaed. (Use of the term "party" in this context may create confusion in any event.)<br><br>Subdivision (a), with suggested changes shown in bold italics:<br><br><u>(a) A subpoena in a civil proceeding may require that electronically stored information be produced and that the party serving the subpoena, or</u> | The committee agreed that the statute should refer to subpoenaed persons and subpoenaing parties rather than to witnesses or parties. The entire section has been revised.<br><br>This subdivision has been revised, but differently than proposed (based on another |


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| | | | | someone acting on the party's request, be permitted to inspect, copy, test, or sample the information. Any subpoena seeking electronically stored information shall comply with the requirements of Code of Civil Procedure Section 1985 et seq.***, and shall be governed by this chapter***.<br><br>Subdivision (b), with suggested changes shown in bold italics, to correspond to other provisions in the discovery statutes:<br><br>(b) A party serving a subpoena requiring production of electronically stored information ~~***must***~~ ***may*** specify the form in which each type of information is to be produced.<br><br>Subdivision (c), with suggested changes shown in bold italics:<br><br>(c) If a ~~***party***~~ ***person*** responding to a subpoena requiring production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the request, the ~~***responding party***~~ ***person subpoenaed*** shall state in its response the form in which it intends to produce each type of the information.<br><br>Some CAJ members suggest deleting subdivision (c) entirely because a subpoenaed witness is not | comment).<br><br>The committee agreed with this suggestion.<br><br>The committee agreed that subdivision (c) should be |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.

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| | | | | required to serve a response. Others believe that requiring a response from a subpoenaed witness, where that witness contemplates responding to the subpoena by producing ESI in a format other than the one requested, would be appropriate and that the subdivision should be retained with modifications (or that a provision providing for a witness objection be added to subdivision (d) below). | deleted entirely |
| | | | | Subdivision (d), [re-lettered as (c)], with suggested changes shown in bold italics:<br><br>[(c)] Unless the ***subpoenaing party and the subpoenaed person*** ~~parties~~ otherwise agree or the court otherwise orders:<br><br>(1) If a subpoena requiring production of electronically stored information does not specify a form for producing a type of electronically stored information, the ~~***responding party***~~ ***person subpoenaed*** shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable; and<br><br>(2) A ~~***party***~~ ***subpoenaed person*** need not produce the same electronically stored information in more than one form. | The committee agreed with these suggestions. |
| | | | | Subdivision (e), [re-lettered as (g)], with | |



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| | | | | suggested changes shown in bold italics:<br><br>[(g)] If necessary, the ***~~responding party~~ person subpoenaed*** at the reasonable expense of the ***~~requesting~~ subpoenaing*** party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form.<br><br>Proposed subdivision (f) provides as follows:<br><br>(f) Subject to subdivisions (g) and (h), the provisions of Code of Civil Procedure Section 2016.010 et seq. relating to the discovery of electronically stored information apply to a person responding to a subpoena as if that person were a party.<br><br>Some CAJ members suggest deleting or narrowing this subdivision, on the grounds that a subpoenaed witness should not be subject to all requirements imposed on litigants responding to discovery requests (statement of compliance, etc.).<br><br>CAJ also recommends that: 1) Section 1985.8 should refer to the ESI definition contained in section 2016.020; 2) The term "electronically stored information" should be added to section | The committee agreed that proposed subdivision (f) should be eliminated entirely. Instead, the committee has added new subdivisions (d)–(f), (h)–(i), and (l). These subdivisions contain all the essential provisions on the discovery of electronically stored information from sections 2031.060 and 2031.310 that should also apply to subpoenas. Like Federal Rule Civ. P. 45, this section would include these provisions directly rather than merely by reference.<br><br>1) The committee agreed with this suggestion; 2) It agreed with this suggestion; 3) The |



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| | | | | 1985(a); and 3) Other discovery statutes applicable to nonparty witnesses (Chapter 6, beginning with section 2020.010) should be modified. Consideration should also be given to whether the definition of "business records" should include ESI. For example, Code of Civil Procedure section 2020.410 refers to deposition subpoenas for the production of business records. The current proposal does not contain any provisions to change this section to deal with ESI. Additionally, an amendment to section 2020.420 might be required to address the qualifications of deposition officers who copy ESI. Because all of the provisions related to non-party discovery are not addressed, the issue is open for potential confusion.<br><br>Finally, there was concern among some CAJ members that the cost burden of the production of electronically stored information is not taken into account in the statutes, other than by court order, and a belief that Evidence Code section 1563 should also be amended to provide for recovery of the costs of producing ESI. | committee did not regard this as necessary. Revised section 1985.8 provides the essential provisions for any subpoenas seeking the discovery of electronically stored information. In the future, however, it may be desirable to review and amend for clarity other discovery statutes so that they include specific references to the discovery of electronically stored information.<br><br>This suggestion is beyond the scope of the proposal that was circulated. |



Positions: A = Agree; AM = Agree only if modified; N = Do not agree.