

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

Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Dennis M. Perluss, Chair
Discovery Subcommittee
Hon. Andrew P. Banks, Chair
Patrick O'Donnell, Supervising Attorney, 415-865-7665,
patrick.o'donnell@jud.ca.gov

DATE: August 4, 2009

SUBJECT: Electronic Discovery: Early Case Management (amend Cal. Rules of Court, rule 3.724) (Action Required)

Issue Statement

California discovery law has recently been modernized to address issues relating to the discovery of electronically stored information. Legislation was introduced last year to improve the procedures for handling the discovery of such information in civil cases.¹ The legislation was jointly sponsored by the Judicial Council of California, California Defense Counsel, and the Consumer Attorneys of California. The Electronic Discovery Act was enacted without opposition and was approved by Governor Arnold Schwarzenegger on June 29, 2009. As urgency legislation, it became effective immediately.²

This proposal supplements the Electronic Discovery Act by amending a rule in the California Rules of Court on the management of civil cases to ensure that parties and the courts address issues relating to the discovery of electronically stored information early in the course of litigation.

¹ The legislation was originally included in Assembly Bill 926 (Evans). After that bill was vetoed along with many others, the legislation was reintroduced in December 2008 as AB 5. The bill is available at: www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_bill_20090629_chaptered.pdf

² The legislation amends the Civil Discovery Act, among other things, to define "electronically stored information," to clarify the scope of discovery of that information, to provide that parties may specify the form or forms in which that information is to be produced, and to provide procedures for better handling the discovery of that information.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council amend rule 3.724 of the California Rules of Court, effective August 14, 2009, to require that parties, when they meet and confer before the initial case management conference in a civil case, consider any issues relating to the discovery of electronically stored information.

The text of amended rule 3.724 is attached at pages 7–8.

Rationale for Recommendation

Background

The transformation of information from being primarily in the form of paper documents to being primarily stored electronically has significantly affected the civil discovery process. The volume and number of locations of electronically stored documents are 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. Another difference is that once paper documents are destroyed, they are permanently lost, whereas “deleted” electronic information generally can be retrieved and so may be discoverable.

The advent of electronically stored information also affects the costs of discovery. The large volume of electronically stored information sometimes can significantly increase the amount of time and cost of searching for information. But when electronic discovery is properly managed, it can also greatly reduce the cost of discovery.³

In response to the development of electronically stored information, federal and state courts have taken action 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 also recently amended their discovery statutes or rules to include provisions relating to electronic discovery. As mentioned at the beginning of this report, California has just enacted major legislation regarding the discovery of electronically stored information in civil cases. As courts have worked to modernize discovery practices and procedures, it has been widely recognized that identifying and considering issues relating to the discovery of electronically stored information early in the course of litigation is beneficial for both the courts and the parties. At the federal and state levels, rules and guidelines are being developed to encourage early discussion of these issues.

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

For example, the notes on the 2006 amendments to Rule 26 of the Federal Rules of Civil Procedure include the following statements: “When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties”; “Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms”; and “Failure to address preservation issues early in the litigation increases uncertainty and raises the risk of disputes.” (Fed. Rules Civ. Proc., Rule 26, Advisory Committee Notes on 2006 Amendment, subdivision (f).)

Similarly, the guidelines on the discovery of electronically stored information of the Conference of Chief Justices state: “If a party intends to seek the production of electronically stored information in a specific case, that fact should be communicated to opposing counsel as soon as possible and the categories and types of information to be sought should be clearly identified.” (Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically Stored Information* (approved August 2006), p. 1.)

The National Conference of Commissioners on Uniform State Laws has commented: “There is almost universal agreement that early attention to issues relating to the discovery of electronically stored information, including preservation issues, facilitates orderly discovery.” (National Conference of Commissioners on Uniform State Laws (NCCUSL), *Uniform Rules Relating to Discovery of Electronically Stored Information*, Rule 3, Reporter’s Notes.)

Finally, the preface to the Sedona Principles states that “parties are well-served by an early discussion about the issues in dispute, the types of information sought, the likely sources and locations of such information, and the realistic costs of identifying, locating, retrieving, reviewing, and producing such data.” (*The Sedona Principles: Best Practices, Recommendations, and Principles for Addressing Electronic Document Production* (Sedona Conference, July 2005 Version, p. iv.)

Proposed Amendment to Rule 3.724

This proposal recommends the amendment of rule 3.724 of the California Rules of Court, which requires parties in civil cases to meet and confer before the initial case management conference. To promote the early identification and discussion of issues relating to the discovery of electronically stored information, a new subpart would be added to rule 3.724. Subpart (8) would provide that, when the parties meet and confer, they must consider issues relating to the production and preservation of discoverable electronically stored information.

The new subpart specifically identifies the issues relating to the discovery of electronically stored information to be considered:

- Issues relating to the preservation of discoverable electronically stored information;
- The form or forms in which the information will be produced;
- The time within which the information will be produced;
- The scope of discovery of the information;
- The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;
- The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;
- How the cost of production of electronically stored information is to be allocated among the parties; and
- Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information.

(See amended rule 3.724(8)(A)–(H).)⁴

The proposal as circulated also would have amended rule 3.728, on case management orders, to add a statement that the court may include appropriate orders relating to relating to the discovery of electronically stored information in the case management order.⁵ However, on further review, the committee concluded that this provision is unnecessary; it is already covered by the provision in current rule 3.728(13) that states that a case management order may include appropriate provisions, including orders on matters listed in rule 3.724. Hence, if rule 3.724 is amended as recommended, the court may consider issues relating to the discovery of electronically stored information at the initial case management conference and include any appropriate provisions relating to these matters in its case management order.

The amendment to rule 3.724 should become effective as soon as the Judicial Council approves it. This will assist in implementing the new e-discovery legislation which, as urgency legislation, immediately went into effect.

⁴ The list of issues in rule 3.724(8) is derived from the NCCUSL’s *Uniform Rules Relating to Discovery of Electronically Stored Information*, Rule 3(a)(1)–(7) and (b).

⁵The proposed addition would have stated: “Any appropriate orders relating to the discovery of electronically stored information.”

Alternatives Actions Considered

For the past several years, the committee has believed that the rules on civil case management should be amended to encourage parties and the courts to identify and consider issues relating to the discovery of electronically stored information early in the course of litigation.⁶ There have sometimes been different points of view on how early the parties should be required to confer about these matters. As discussed further in the next section, the committee has concluded that parties should be required to confer about electronic discovery at the same time as they confer about other matters under rule 3.724—that is, at least 30 calendar days before the date set for the initial case management conference. However, this does not mean that parties cannot confer earlier. Indeed, earlier discussions often may be very useful and productive; hence, they are encouraged.

Comments From Interested Parties

This rules proposal was circulated along with the accompanying legislative proposal in the winter of 2008. Specific comments on the rules were received from attorneys, a court, a judge, a city attorney's office, the California Commission on Uniform State Laws, California Defense Counsel, the Committee on Administration of Justice of the State Bar of California, and the California Chamber of Commerce. All twelve of the commentators discussed the proposed rule amendments. A chart summarizing the comments and the committee's responses is attached at pages 9–28.

The comments on the rules were generally favorable, although some commentators suggested specific modifications to the proposed rules that were circulated. The committee agreed with several of these comments and revised the rules proposal. For instance, amended rule 3.724 as circulated would have provided that the parties in civil cases, where there is written notice that the case is likely to involve the discovery of electronically stored information, must confer about electronic discovery issues at least 45 days before the case management conference. This provision was intended to promote early discussion of such issues. However, a number of commentators objected to this provision. They pointed out that conferring at least 45 days before the conference would be too early in many cases and would require conferring twice. Also, a court pointed out

⁶ In spring 2006, a somewhat similar rules proposal was circulated for public comment. It would have amended rule 212 (on civil case management) to include new provisions relating to electronic discovery. The Civil and Small Claims Advisory Committee decided not to go forward with the proposal at that time, concluding that any such changes should be part of a more comprehensive approach to electronic discovery. Merely discussing electronic discovery issues without having a comprehensive statutory framework for addressing these issues would have had limited value. Hence, the Discovery Subcommittee worked with members of attorney organizations to develop the electronic discovery proposals, which includes the comprehensive amendments to the Civil Discovery Act in AB 5 as well as the rule amendment proposal in this report.

that the 45-day requirement would conflict with rule 3.722(b), which requires courts to give only 45 days' notice of the date of the case management conference. The committee agreed with these comments and modified rule 3.724 to require parties to confer about electronic discovery issues at the same time that they discuss other matters—that is, at least 30 calendar days before the initial case management conference.

Based on the comments, the committee also eliminated a new provision in rule 3.724 that would have required parties to provide written notice that discovery of electronically stored information would likely be sought in the proceeding. The committee concluded that this separate written notice is unnecessary. Under the new legislation and rule, a party demanding electronically stored information will make its intention clear in the course of ordinary discovery demands and the case management process.

Implementation Requirements and Costs

The proposed amendment of the rule should not result in any significant new costs for either the courts or attorneys, particularly because conferring about electronic discovery issues will take place at the same time that other issues are addressed in course of the civil case management process. It is the intent of this rule proposal, which encourages parties to address issues relating to electronic discovery early, to resolve these issues expeditiously and reduce the expense of litigation.

Attachments

Rule 3.724 of the California Rules of Court is amended, effective August 14, 2009, to read:

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

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

- 7
- 8 (1) Resolving any discovery disputes and setting a discovery schedule;
 - 9
 - 10 (2) Identifying and, if possible, informally resolving any anticipated
11 motions;
 - 12
 - 13 (3) Identifying the facts and issues in the case that are uncontested and may
14 be the subject of stipulation;
 - 15
 - 16 (4) Identifying the facts and issues in the case that are in dispute;
 - 17
 - 18 (5) Determining whether the issues in the case can be narrowed by
19 eliminating any claims or defenses by means of a motion or otherwise;
 - 20
 - 21 (6) Determining whether settlement is possible;
 - 22
 - 23 (7) Identifying the dates on which all parties and their attorneys are
24 available or not available for trial, including the reasons for
25 unavailability; ~~and~~
 - 26
 - 27 (8) Any issues relating to the discovery of electronically stored information,
28 including:
 - 29
 - 30 (A) Issues relating to the preservation of discoverable electronically
31 stored information;
 - 32
 - 33 (B) The form or forms in which information will be produced;
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 - 35 (C) The time within which the information will be produced;
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 - 37 (D) The scope of discovery of the information;
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(E) The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;

(F) The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or person not a party to the civil proceedings;

(G) How the cost of production of electronically stored information is to be allocated among the parties;

(H) Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information; and

~~(8)~~(9) Other relevant matters.

LEG08-01/W08-01

Electronic Discovery: Case Management Rules (amend Cal. Rules of Court, rule 3.724)

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
Case Management Rules (Cal. Rules of Court, rule 3.724)					
1.	California Chamber of Commerce Kyla Christoffersen Policy Advocate Sacramento	AM	Y	The proposed rules would add a new meet-and-confer requirement for electronic discovery that is separate from—and 15 days earlier than—the preexisting, general meet-and-confer session. In contrast, the federal rules simply added electronic discovery to the preexisting meet and confer session without altering the schedules. The federal approach makes more sense primarily because electronic discovery tends to be far more voluminous and complex than the rest of discovery. Thus, parties generally will not be able to master their electronic discovery situation before they achieve mastery of the rest of their discovery issues. Consequently, the proposed rules should be amended to simply add electronic discovery to the preexisting meet-and-confer session.	The committee agreed that electronic discovery should be addressed at the same time as other discovery issues, i.e., 30 calendar days before the date set for conference. It has modified the proposal to reflect this.
2.	California Commission on Uniform State Laws Pamela Winston Bertaini Commissioner Sacramento	A	Y	Comments are specifically invited regarding whether, when an attorney receives notice under rule 3.724(b) that the discovery of electronically stored information is likely to be sought in the action, the attorney should be required immediately to notify his or her client that such information is likely to be sought. The California Commission recommends a client notification requirement. Such notification may decrease the prospect of discoverable electronically stored	Based on other comments, the committee has eliminated subdivision (b) and relocated most of the items in proposed subdivision (b) to new subpart (8). Also, it has decided not to require notice to clients under the rule; this would be left to the attorneys.

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				information being lost, damaged, altered, overridden, or otherwise impaired. Moreover, a client notification provision will comport with adapting discovery procedures to address the dynamic nature of electronically stored information—the very purpose of the proposed amendments.	
3.	California Defense Counsel Edith R. Matthai President Sacramento	A	Y	We support the language contained in proposed new subdivision (b) of rule 3.724, which permits counsel to invoke an obligation to meet and confer on issues relating to electronically stored information, when such information is reasonably likely to be sought in a proceeding.	The substantive meet-and-confer provisions are retained in the rule, but have been relocated from subdivision (b) to subpart (8).
4.	Thomas Green Assistant Attorney General State of California Department of Justice Sacramento	AM	N	The creation of a separate case management conference for electronically stored information is inconsistent with the fact that digital information is pervasive, and the effects of counsel’s decision <i>not</i> to notice such a conference are unclear. The committee proposes a new rule 3.724(b) that provides that “[i]f any party informs another party in writing that discovery of electronically stored	Based on other comments, the committee has dropped the provision for written notice 45 days before the conference from amended rule 3.724. Under the proposed amended rule, the parties will discuss electronic discovery issues at the same time they discuss other issues before the conference. This specific provision has been eliminated.

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>information is reasonably likely to be sought,” a special meet and confer obligation is created. Creation of this separate case management conference creates two distinct issues that the committee should consider. First, electronically stored information is pervasive, so a separate conference may be inefficient. This is the reason that the amended Federal Rules of Civil Procedure incorporate ESI issues into the first Fed.R.Civ.P. 16(b) conference. Second, it is not clear what effect a decision <i>not</i> to notice the proposed ESI case management conference may have. Is a decision by all parties to not notice this new CMC implicitly an agreement that only paper records will be used in their litigation? If so, does this relieve all parties from their common law obligation to preserve potentially relevant evidence so long as that probative evidence is not on paper? If this is what the committee intends, it should make that intent clear.</p> <p>Electronic records are pervasive. A publication of the University of California’s School of Information Management and Systems reports that 92 percent all new information is stored on magnetic media, primarily on hard disks, while only 0.01 percent is stored on paper. (Peter Lyman and Hal R. Varian, <i>How Much Information?</i> 2003 1 (UC Berkeley School of Information Management and Systems, October</p>	<p>First, the committee agreed that a separate conference is unnecessary; it has relocated the items to be discussed relating to e-discovery to subpart (8). Second, the specific notice requirement has been eliminated. The attorneys’ duties under existing law relating to the preservation of evidence remain unchanged.</p> <p>The committee agreed that electronic records are pervasive. That is a major reason why the new legislation and rule amendments are needed.</p>

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				<p>27, 2003), at http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_execsum.pdf. These statistics strongly suggest that to rely only on paper discovery represents a decision to ignore vast amounts of information. For this reason, the Federal Rules of Civil Procedure incorporate consideration of e-evidence in initial meet and confer sessions among counsel (Fed.R.Civ.P. 26(f)); early mandatory disclosures (Fed.R.Civ.P. 26(a)) and the initial case management conference. Fed.R.Civ.P. 16(b).</p> <p>On the other hand, counsel may decide that the costs of securing and processing electronic records exceed their probative value. While this could be discussed and agreed to in a normal case management conference, the existence of a special conference raises questions that the committee's proposal does not clearly answer. Specifically, does the committee intend to relieve all parties of their obligation to preserve electronic evidence if no party notices the new ESI case management conference? This is an important question because most electronic mail systems overwrite old e-mail every 30, 60, or 90 days. This means that potentially probative electronic evidence will be gone unless affirmative steps are taken to preserve it.</p>	<p>The requirement for a separate conference has been eliminated.</p>

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>By way of background, the obligation to preserve relevant evidence arises from the common law. See, e.g., <i>Fortuna-Krause, et al. Claimants</i>, 15 U.S. 161, 2 Wheat. 161 (1817), <i>Wm. T. Thompson v. General Nutrition Corp.</i>, 593 F.Supp. 1443, 1455 (C.D.Ca. 1984). This obligation can exist before a case is filed or a discovery demand has been issued. See <i>The Sedona Conference Commentary on Litigation Holds</i> (Sedona Conference, August 2007), at http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf (overview of case law).</p> <p>In California, the failure to preserve evidence can generate powerful sanctions under the California Discovery Act, ethical sanctions against counsel and potential criminal liability. <i>Cedars-Sinai Medical Center v. Superior Court</i> (1998) 18 Cal.4th 1. And the failure to preserve electronic records has been sanctioned in a number of California cases. See, e.g., <i>Electronic Fund Solutions, LLC v. Murphy</i> (2005) 134 Cal.App.4th 1161 (default entered). <i>R.S. Creative, Inc. v. Creative Cotton, Ltd.</i> (1999) 75 Cal.App.4th 486 (terminating sanction).</p> <p>While it may make sense to eliminate digital evidence in some cases (along with the duty to sequester and preserve such evidence), that should</p>	<p>The proposed legislation and rules are not intended to change the law regarding the preservation of relevant evidence.</p> <p>The proposal is not intended to change the law regarding digital evidence.</p>

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				be made clear, if that is the committee's intent. Otherwise, the committee may expose unwary litigants to severe spoliation sanctions.	
5.	William N. Kammer Partner Solomon Ward Seidenwurm & Smith San Diego	AM	N	<p>Certainly a good idea to add e-discovery to the topics of discussion at the case management conference.</p> <p>The proposal dictates a second meeting 45 days in advance of the case management conference; there is already a required meeting at 30 days. The two dates should be harmonized.</p> <p>I also consider the required notice an unnecessary procedure.</p>	<p>The committee agreed with this comment.</p> <p>The committee agreed and eliminated the requirement of a separate early conference on e-discovery issues. Instead, the rule would provide that these issues must be addressed along with the other issues identified in rule 3.724 at least 30 days before the initial case management conference.</p> <p>The committee agreed and eliminated the notice requirement.</p>
6.	Lawrence R. Ramsey Bowman and Brooke LLP Gardena	A	Y	The proposal permits counsel and the court to identify and provide for discovery of electronically stored information (ESI), 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	The committee agreed generally with the comment.

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				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. In particular, we support the language contained in proposed new subdivision (b) of rule 3.724, which permits counsel to invoke an obligation to meet and confer on ESI issues, when ESI is reasonably likely to be sought in a proceeding.	
7.	San Francisco City Attorney's Office Margaret Baumgartner Deputy City Attorney San Francisco	AM	Y	<p>The City Attorney welcomes the proposed amendment of California Rules of Court, rule 3.724 to require parties to meet and confer regarding discovery of electronically stored information ("ESI") if one of the parties provides written notice that such discovery is reasonably likely and to require such information to be included in the Case Management Statement. Such early discussion and resolution of electronic discovery issues is key to minimizing the expense of such discovery.</p> <p>However, the City believes that the rule will facilitate the early resolution of potential electronic discovery issues only if it imposes consequences upon a party for failure to provide such written notice in timely fashion or to meet and confer</p>	The committee agreed that the early discussion of issues relating to the discovery of electronically stored information is important. However, based on other comments, the committee has dropped from amended rule 3.724 the provision for written notice and the requirement that the parties meet and confer at least 45 days before the conference. Under the recently enacted e-discovery legislation, parties engaged in discovery will generally become aware if a case involves the discovery of

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>regarding such discovery. The proposed amendments do not provide a time limit by which a party must provide written notice that discovery of ESI is reasonably likely. Nor does the rule limit a party's right to seek discovery of ESI if the party has failed to provide such notice, or if the party refuses to meet and confer regarding electronic discovery issues. Such consequences are necessary to ensure that the obligation of preserving and producing potentially relevant electronic data does not create a disproportionate burden on a party engaged in litigation....</p> <p>In addition, the City believes that providing a means by which a party can involve the court in resolving any concerns early in the litigation will help reduce the expense and administrative burden imposed by electronic discovery. The rules should provide for such a procedure....</p> <p>Requiring an early resolution of any issues regarding the scope of the potential electronic discovery can reduce the burden on the parties....</p> <p>[C]urrently, parties obtain a court order regarding</p>	<p>electronically stored information through the regular discovery process; hence, separate notice is not required. Furthermore, under amended rule 3.724, the parties will consider issues relating to electronic discovery early in the litigation in connection with preparing for and attending the case management conference.</p> <p>The committee agreed that amended rule 3.724 should promote early discussion of e-discovery issues and involve the court through the case management process in addressing concerns relating to the discovery of electronically stored information.</p> <p>The committee agreed that early resolution of electronic discovery issues is desirable. For that reason, it has included new subpart (8) in rule 3.724.</p> <p>The amendment of rule 3.724 is</p>

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>specific discovery only after a written request for discovery, a response, a meet and confer and then a noticed motion. Such a motion usually would not be ripe until the litigation has progressed substantially, by which time a party will likely already have incurred considerable expense merely to preserve electronic data.</p> <p>The City believes that the best means to ensure that the parties pay appropriate attention to this issue early is to provide a consequence for failure to do so and a mechanism by which the parties can obtain court assistance absent a motion to compel or a motion for a protective order. The rules therefore should do more than merely encourage parties to address the issue of electronic discovery early. The rules should limit the electronic discovery rights of parties who impede efforts at such early resolution and provide for court resolution.</p> <p>The City Attorney suggests, therefore, that Rules 3.724 and 3.728 be amended to:</p> <p>(1) Require that a party who believes that discovery of electronically stored information is reasonably likely provide written notice at least 60 calendar days prior to the initial case management conference;</p>	<p>meant to encourage early consideration of any issues relating to the discovery of electronically stored information. Thus, it should enable the parties to address issues, including costs, as soon as possible.</p> <p>Existing sanctioning authority appears sufficient to ensure proper attention to issues relating to the discovery of electronically stored information. However, if, based on experience with the new legislation and rules, further legal changes are necessary, the committee will consider proposals.</p> <p>Responses to suggestions:</p> <p>(1) Although early discussions about e-discovery are desirable, requiring formal notice 60 days before the conference is not necessary and is too early.</p>

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>(2) Preclude a party who fails to provide such notice, or who refuses timely to meet and confer, from discovery of electronically stored information unless the party first obtains leave of court to do so, upon a showing of good cause; and</p> <p>(3) Provide that any party may request that the court hold a case management conference to address electronic discovery issues.</p> <p>The City believes that absent these proposed amendments, the provisions intended to</p>	<p>Under current rule 3.722, courts do not need to give the parties notice of the conference until 45 days before the conference. (See Cal. Rules of Court, rule 3.722(b).) Hence, if notice were to be required (which it is not under the revised rule), it would not be feasible for parties to give such notice earlier than that time.</p> <p>(2) The proposal to preclude a party from conducting e-discovery is new and, if pursued, would need to be circulated for comment.</p> <p>(3) A party may request an additional conference under the current rules. (See rule 3.723.) A more specific rule for requesting a special conference on e-discovery would need to be developed and circulated, but does not appear to be necessary.</p> <p>The committee disagreed that the amendments will be</p>

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				encourage early discussion and resolution of electronic discovery issues will be ineffective.	ineffective unless modified as proposed.
8.	David L. Stanton Partner Pillsbury Winthrop Shaw Pittman, LLP Los Angeles	AM	N	Neither I nor the colleagues with whom I have spoken have encountered any litigation in the past 15 years that does not involve the discovery of electronically stored information. Yet the proposed amendment to Rule 3.724(b) treats such cases as unique, imposing new notification and expedited meet and confer requirements where the discovery of ESI is “reasonably likely” to occur. There is no need for this special treatment. It is “reasonably likely” that discoverable ESI will arise in almost every modern lawsuit. Moreover, the topics to be discussed under proposed Rule 3.724(b)(1)-(8) can be addressed at the time of the meet and confer provided under proposed Rule 3.274(a). There is no reason to conduct a separate discussion, 15 days earlier, limited to ESI. Further, the requirement under proposed Rule 3.724(b) that the parties meet and confer 45 calendar days before the date set for the initial case management conference may conflict with Rule 3.722(b), which requires that the Court provide notice of the case management conference only 45 days in advance.	The committee has revised the rule to eliminate the written notice provision and to provide that parties confer about e-discovery issues at the same time as they discuss other issues.
9.	State Bar of California Committee on Administration of Justice	AM	Y	Comments are specifically invited on whether, when an attorney receives notice under proposed rule 3.724(b) that the discovery of electronic	The committee agreed with this comment and has eliminated the proposed written notice

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	San Francisco			<p>information is likely to be sought in the action, the attorney should be required immediately to notify his or her client that such information is likely to be sought. The Committee on Administration of Justice (CAJ) believes that the addition of any such provision in the California Rules of Court is not necessary. The obligations imposed on an attorney exist independent of the rules of court.</p> <p>CAJ also believes that imposing a dual meet-and-confer requirement—one for all cases and a second for cases where a party is informed that ESI is likely to be sought—is unworkable and unnecessary.</p> <p>Proposed subdivision (b) does, however, address important issues relating to ESI, which is likely to be sought in almost all cases these days. CAJ therefore recommends that the provisions of proposed rule 3.724(b) be added to rule 3.724 instead of being adopted as a separate subdivision. As a result of the additional issues that would be covered, CAJ also recommends that the requirement to meet and confer 30 calendar days before the date set for the initial case management conference be changed to 45 calendar days. CAJ also proposes some modifications to the language of rule 3.724, shown below in bold italics.</p>	<p>provision.</p> <p>The committee agreed with this comment and has eliminated the dual meet-and-confer requirement.</p> <p>The committee agreed that the provisions in subdivision (b) should be incorporated into the rule instead of being a separate subdivision.</p> <p>The committee disagreed with this suggestion on timing. It concluded that the parties should continue to confer on all issues, including e-discovery issues, at least 30 days before the case management conference.</p>

	Commentator	Position	Comment on behalf of group?	Comment	Committee Response
				<p>As proposed to be modified, rule 3.724 would read as follows:</p> <p>Rule 3.724 Duty to meet and confer</p> <p>Unless the court orders another time period, no later than 30 45 calendar days before the date set for the <u>initial</u> case management conference, the parties must meet and confer, in person or by telephone, to consider each of the issues identified in rule 3.727 and, in addition, to consider the following:</p> <ol style="list-style-type: none"> (1) Resolving any discovery disputes and setting a discovery schedule; (2) Identifying and, if possible, informally resolving any anticipated motions; (3) Identifying the facts and issues in the case that are uncontested and may be the subject of stipulation; (4) Identifying the facts and issues in the case that are in dispute; (5) Determining whether the issues in the case can be narrowed by eliminating any claims or defenses by means of a motion or otherwise; 	<p>The committee would retain the present 30-day time frame.</p>

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				<p>(6) Determining whether settlement is possible;</p> <p>(7) Identifying the dates on which all parties and their attorneys are available or not available for trial, including the reasons for unavailability;</p> <p>(8) <u>Any issues relating to the <i>production and preservation of discoverable electronically stored information, including</i></u></p> <p>(a) <u>The form or forms in which information will be produced;</u></p> <p>(b) <u>The time within which the information will be produced;</u></p> <p>(c) <u>The scope of discovery of the information;</u></p> <p>(d) <u>The method for asserting or preserving claims of privilege or attorney work product, including whether such claims may be asserted after production;</u></p> <p>(e) <u>The method for asserting or preserving the confidentiality, privacy, trade secrets, or proprietary status of information relating to a party or</u></p>	<p>The committee agreed that the consolidation of proposed subdivision (b) into subpart (8) is appropriate and revised the rule text. The language used in (8) is similar, but not identical, to that proposed by the commentator. The final language of (8) is that recommended by the Judicial Council’s Rules and Projects Committee.</p>

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				<p><u>person not a party to the civil proceedings;</u></p> <p>(f) <u>How the cost of production of electronically stored information is to be allocated among the parties; and</u></p> <p>(g) <u>Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information; and</u></p> <p>(8)(9) Other relevant matters.</p>	
10.	Robert B. Stringer Attorney Crowley, Stringer & Fenske LLP San Francisco			<p>The meet-and-confer requirement should specifically require the parties to discuss and agree upon key words to be used in searching for relevant ESI, subject to further meeting and conferring should the agreed-upon key words prove not to be as effective as hoped. The reason is that key words, although apparently the best method available to date, are not a very precise tool, so they result in the collection of files that are both over-inclusive and under-inclusive. Requiring the parties to cooperate on this specific subject before a dispute arises regarding what was produced could help minimize both the cost and the very real possibility that a party will fail to produce relevant ESI, not deliberately, but</p>	<p>The committee believes that this proposed requirement is too specific. The issues identified in the comment would fall under the provisions included in amended rule 3.724(8).</p>

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				because in hindsight it develops that that party's use of key words was not as artful as it could have been.	
11.	Superior Court of California, County of Los Angeles Los Angeles	AM	Y	<p>Including electronic discovery in the items to be addressed in the case management order and the pre-case management conference meet-and-confer is a good idea. We suggest that the list of topics for discussion in advance of the case management conference be expanded to include the format for production of electronic data, the scope of search terms, the scope of production of particular type of data such as emails, text messages, telephone data and the like.</p> <p>However, there seems to be a problem with the timing of the proposed meet-and-confer requirement. Currently, only 45 days notice of the date of the case management conference is required. (See rule 3.722(b)). However, proposed rule 3.724 requires the parties to meet and confer 45 days before the conference, which may not be possible unless the conference notice requirements are changed.</p> <p>Requiring a party to meet and confer 45 days before the case management conference relating to electronic discovery (rule 3.724(b)) and having a different timing requirement for the meet and confer for all other case management conference</p>	<p>The current list in rule 3.724(8) covers these topics in general terms. The committee did not regard greater detail as necessary.</p> <p>The committee agreed that the earlier conference on e-discovery issues would have created a conflict. It has eliminated the 45-day requirement for conferring on such issues.</p>

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				related issues (30 days before the conference as set forth in rule 3.724(a)) seem unnecessarily burdensome. Perhaps there should just be one meet-and-confer on all issues 30 days before the case management conference.	The committee agreed with this suggestion and has modified the rule.
12.	Hon. Carl J. West Judge of the Superior Court of Los Angeles County	N	N	<p>Electronic data is, or will be, present in all cases. There is no need to give notice of one's intent to pursue discovery of electronic data; clearly one need not give notice of an intent to pursue discovery—and discovery of electronic data will likely become the norm rather than the exception in the near future. This rule is not needed.</p> <p>There is also an apparent conflict between the 45-day meet and confer requirement of the proposed rule and the 45-day notice requirement of Rule 3.722(b)—compliance with the former may not be possible in light of the notice requirement of the latter. The better approach would be to specifically require parties to address discovery issues, including issues related to the discovery of electronic data, in an early meet and confer conference and to bring disputed or unresolved issues to the court's attention before, rather than after, the discovery proceeds. In this regard, the federal model has merit and should be explored further before final rules and statutes are adopted.</p>	<p>The committee agreed and has eliminated from amended rule 3.724 the provision for written notice 45 days before the conference.</p> <p>The committee agreed that the 45-day meet-and-confer requirement was too early. It has eliminated this provision. Instead, the amended rule provides that the parties must meet and confer regarding electronic discovery at the same time that they confer about other issues before the case management conference. The committee did not think that the rule, as revised, should be delayed any further. Particularly now that the Electronic Discovery Act has</p>

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					become law, the amendment of rule 3.724 should also become effective as soon as possible.
Case management order (Cal. Rules of Court, rule 3.728) (not included in final proposal)					
1.	State Bar of California Committee on Administration Of Justice San Francisco	AM	Y	<p>The Committee on Administration of Justice (CAJ) proposes the following additional language (in bold italics) to make the rule consistent with other proposed modifications to the discovery statutes:</p> <p style="text-align: center;"><u>“(13) Any appropriate orders relating to the discovery of electronically stored information, including any reasonable steps necessary to prevent the intentional or unintentional destruction or alteration of electronically stored information that is in the possession, custody or control of any party, taking into consideration both the need to preserve relevant evidence and the need to continue a party, person, or organization’s routine operations.”</u></p>	The committee did not think this level of detail is necessary. Furthermore, it decided that proposed subpart (13) is not needed because current subpart (13) already provides that case management orders may include order on matters listed in rule 3.724 (which includes new subpart (8) in electronic discovery issues).

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2.	Hon. Carl J. West Judge of the Superior Court of California, County of Los Angeles	AM	N	<p>Adding electronic discovery to the items that are to be addressed in the Case Management Conference Order is appropriate. This rule will also insure that the parties address electronic discovery issues in their meet and confer. If anything, this rule should be further amended to list specific topics for discussion by counsel in advance of the Case Management Conference such as the format for production of electronic data, the scope of search terms, the scope of production of particular types of electronic data such as emails, text messages, telephone data, etc. This is not an exhaustive list, however my view is the longer the checklist that counsel are required to address, the better the product that they will produce for consideration by the Court at the case management conference</p> <p>Consideration should also be given to a requirement that discovery issues be addressed by counsel before formal discovery is permitted to proceed. Again, some consideration of the federal model appears warranted. If limitations are not placed on the parties' ability to proceed with discovery directed to electronic data before either agreement is reached among the parties or the court is given an opportunity to place appropriate limits and controls on such discovery, I suggest that our trial courts will be further burdened by discovery disputes relating to discovery directed</p>	<p>The committee concluded it is not necessary to include such a specific list of topics in the rule; instead, these topics might be included in bench guides, practice guides, and other sources. Furthermore, because current rule 3.728(13) already provides that case management order may include orders on the matters included under rule 3.724, it is not necessary to have a separate subpart on e-discovery; hence the proposed amendment of rule 3.728 has been dropped.</p> <p>The committee does not support a hold on discovery. Unlike federal discovery, California discovery relies on the parties to initiate and pursue discovery. On the other hand, early identification discussion of electronic discovery issue is valuable; hence, the amended rules together with the legislation in AB 5 promote such early discussion.</p>

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				to electronic data.	