Calif. E-Discovery Rules Welcomed, With Questions

Law360, New York (July 15, 2009) -- California's new e-discovery regulations should provide some needed guidance on handling electronic data in the nation's largest state court system, although exactly how the new rules will play out in a practical sense remains to be seen, experts said.

"My take on the new California rules is that they're very similar to the federal rules," said Erin Smart, a member of the e-discovery task force at Bingham McCutchen LLP. "There are some small differences in choice of language that leave the door open for the California rules to be interpreted in a slightly different way."

At the end of June, California joined 22 other states by enacting its first set of regulations for dealing with e-discovery in state court cases. Gov. Arnold Schwarzenegger signed the Electronic Discovery Act into law, effective immediately, after vetoing it in 2008 amidst a budget crisis.

For the most part, the new rules closely mirror the 2006 e-discovery amendments to the Federal Rules of Civil Procedure in subjecting electronically stored data to discovery automatically and setting some guidelines on how discovery requests should be handled.

The few key differences between the California rules and the federal rules will be subject to scrutiny and interpretation by the courts in the coming years, attorneys said.

Many attorneys in California, particularly those who deal with smaller or midsize cases, have up to this point focused on paper document discovery, with e-discovery coming up more in complex commercial litigation, said Gareth Evans, a partner at Gibson Dunn & Crutcher LLP.

"One of the impacts of this legislation will be to make e-discovery a more significant part of every case," Evans said.

Before the bill was signed, e-discovery took place in California, he said, "but there weren't rules of the game in place."

Given the new rules, lawyers will need to have some high-level insight into the data at an organization they're representing, said Robert Brownstone, law and technology director at Fenwick & West LLP.

At the very least, they'll need to be aware of where in a client's electronic environment data is stored that could be relevant to litigation, he said.

"To the extent that litigators in state court tried to be ostriches and put their heads in the sand, they're not going to be able to do that anymore," Brownstone said. "I'd say it's a wake-up call for litigators and companies that have not had much federal litigation over the past few years."

One significant difference between the California rules and the federal rules is the treatment of information that is deemed inaccessible, according to attorneys.

Under the federal rules, when a party receives a request for electronically stored documents that it identifies as not reasonably accessible due to undue burden or cost, it does not have to produce them, and the requesting party must bring a motion to compel if it wants the documents.

The California rules, however, "stand federal procedure on its head," Evans said, by presuming that all electronic information is accessible and by not requiring the requesting party to bring a motion to compel.

In addition, the California rules "arguably" require parties that want to avoid producing inaccessible data to object first, he said. The rules state that written responses asserting that the documents are not readily accessible "preserve any objections" the party may have.

That provision could prove to be a "trap for the unwary," Evans said, because if a party does not specifically assert an objection, the opposing party may be able say the objection was waived.

That makes it particularly important for attorneys to have a keen understanding of their clients' document systems before responding to document requests, he added.

Compared with the federal rules, California's regulations "seem to put the risk and burden more on the responding party to demonstrate that it is not accessible," said Mark Askanas, a partner at Jackson Lewis LLP.

That provision could give an advantage to the requesting party, which could make onerous discovery requests "for any number of motives," Askanas noted.

"Ultimately, it cuts both ways," he said. For instance, a company faced with a burdensome discovery request could just as easily make a similar request of its opponent, shifting the burden.

The California rules also provide that courts must limit the frequency and extent of e-discovery when it is possible to obtain the information from a less burdensome source, the discovery would be unreasonably duplicative or the burden outweighs the likely benefit given the amount in controversy.

This attention to proportionality should be a tool to rein in the cost of e-discovery, Evans said.

Another key part of the California rules is a safe harbor provision that prevents courts from imposing sanctions on a party for not producing electronically stored information that has been lost, damaged, overwritten or altered due to routine, good faith operation of an electronic system.

The federal rules have a similar provision that only covers documents that have been lost in such a way, so

the California statute is clearer and "reflects a greater sophistication" with regard to the realities of electronic data, Evans said.

"The biggest practical thing is that California articulates the safe harbor provision very well," Askanas said. "It's more clearly spelled out than the federal rules."

The federal safe harbor provision does not explicitly bear that name, and while it states that parties cannot be sanctioned under the e-discovery rules, it does not preclude courts from imposing sanctions based on other criteria, Smart said.

In contrast, the California rules clearly identify a safe harbor provision by name, and appear to disallow any sanctions for not producing data covered under the provision, she said.

That could provide more protection than the federal rules, she said, although exactly how the rules will be applied remains to be seen.

Smart also noted that the California rules don't have anything analogous to Federal Rule of Evidence 502, which allows parties to claw back privileged documents that are inadvertently released during e-discovery.

The California regulations do include a procedure for bringing such issues to the other side's attention, but there is no guarantee the judge will order the privileged documents to be given back, she said.

Another area where California differs from the federal rules is that the state regulations do not identify a default set of forms in which documents must be produced when a responding party objects to the form requested, as the federal rules do, Smart said.

"That probably means parties are going to need to do a lot more meeting and conferring on form of production" when there is disagreement on form and the parties wish to avoid involving the court, she said.

Discussing those issues early in the litigation will make the process much easier and less expensive, Smart added.

Given the differences and the learning curve of dealing with the new rules, until they have been in place for a while and a body of case law develops around them, "they're still going to be very vague and are not going to have teeth," Brownstone said.

The 27 states that don't currently have e-discovery rules for state courts will eventually follow in California's footsteps, because the challenges presented by e-discovery are the same regardless of where you are, Evans said.

"Ultimately, we're going to see e-discovery rules in all 50 states," he said. "Without them, there aren't clear rules of the game for how to deal with e-discovery issues. They can be dealt with under the general rules of civil procedure, but they don't fit very well, and for some issues, there are not clear guidelines."
