

What is eDiscovery?

Electronic discovery (“eDiscovery”) is discovery of electronic information in litigation. eDiscovery in California is governed generally by the Civil Discovery Act.

In 2009, the California legislature passed the Electronic Discovery Act, an urgency statute, to address specific issues that frequently arise in eDiscovery.



The Electronic Discovery Act is modeled in part on federal rules governing eDiscovery, which took effect December 1, 2006. See FRCP Rules 16 (b)(3)(B)(iii), (iv), 26(b)(2)(B), (b)(5), (f)(3)(c), 34(b)(1)(C), (b)(2)(D), (b)(2)(E), 37(e).

The electronic information sought by eDiscovery is called “ESI.” ESI is an acronym for “electronically stored information,” defined as “information that is stored in an electronic medium.” CCP 2016.020(e) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities. CCP § 2016.020(d).



The Federal Rules do not precisely define “electronically stored information.” FRCP Rule 34 (a) covers information “stored in any medium.”

Examples of electronic media include: computers, email and other servers, memory sticks / flash drives, CDs, DVDs, backup tapes, cell phones.

ESI Considerations

Evaluate the existence and importance of ESI in your case. The following questions should be considered in determining whether your client or your opponent possesses relevant ESI, and how you might be able to obtain it.

- What are the issues in the matter?
- Who are the characters involved in the matter?
- What documents may be relevant to the matter?
 - Are there potential relevant emails?
 - Are there potential relevant documents on computers?
 - Other potential electronic evidence (e.g., electronic logs)?
- Who are the custodians of data?
 - What electronic systems do they use?
 - What are their procedures for maintaining and deleting ESI?



Utilize the meet and confer process to evaluate each party’s electronic systems. As appropriate, follow-up with discovery concerning the parties’ electronic systems.

- What are the costs or burdens of obtaining ESI versus the likely existence of relevant information?

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By Tyler Atkinson (tatkinton@mcmanislaw.com)

Duty to Preserve Evidence: A party, or anyone who anticipates being a party, to a lawsuit has a duty not to destroy evidence. Cedars-Sinai Med. Ctr. v. Sup. Ct. (1998) 18 Cal.4th 1.

Safe Harbor: absent “exceptional circumstances,” a party cannot be sanctioned for destruction or altering of ESI in the routine, good faith operation of an organization’s electronic information system. CCP § 2031.060(i)(1).

Litigation Hold: notify client to duty to preserve potential evidence; work with client’s IT personnel to ensure effective hold; confer with expert if necessary. Use document preservation memorandum and monitor compliance.

Preservation Letter: notify opposing party of existence of current or imminent litigation; state what type of evidence will be relevant to the subject matter of the litigation; demand that all potentially relevant ESI be preserved.



The preservation letter helps preserve evidence in the case and helps keep the opposing party from successfully asserting the safe harbor provision.

Duty to Meet and Confer - California Rule of Court, Rule 3.724:

On August 14, 2009, the California Judicial Council amended California Rule of Court Rule 3.724 to incorporate new eDiscovery guidelines. Under the amended rule, no later than 30 calendar days before the initial CMC, the parties must meet and confer, in person or by telephone, to consider, among other issues:

- Issues relating to the preservation of discoverable electronically stored information;
- The form or forms in which 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;
- Any other issues relating to the discovery of electronically stored information, including developing a proposed plan relating to the discovery of the information .



FRCP Rule 26 (f) requires parties to confer as soon as practicable, and in any event at least 21 days before a scheduling conference. The parties are required to develop a discovery plan stating the parties’ views and proposals on any issues regarding discovery, including ESI.

Summary of Procedures to Obtain ESI in Discovery

ESI from parties:

- Request for Production. Under CCP § 2031.010, a party may serve a demand, without a prior court order, on another party for the production of documents, tangible things, or electronically stored information (hereinafter, “Request for Production”). See CCP §§ 2031.010–2031.510.
- Deposition notice. A party also may be required to produce documents or other things at his or her deposition, if the notice of deposition provides for such production. See CCP §§ 2025.220(a)(4), 2025.280(a).
- Interrogatories. At the option of the responding party, a party may specify writings from which an answer may be derived if the answer would require a compilation, abstract, audit, or summary of the documents of the answering party, and if the burden or expense of preparing or making it would be substantially the same for either party. See CCP § 2030.230.

ESI from parties and non-parties:

- Deposition subpoena. A nonparty may be required, by service of a deposition subpoena, to produce documents or other things at a deposition. See CCP § 2020.020(b).
- Subpoena duces tecum. A subpoena in a civil proceeding may require that ESI 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. See CCP 1985.8(a)(1).

Two of the more popular means of obtaining eDiscovery, the Request for Production, directed to a party, and the Subpoena, directed to a non-party, are summarized below.

Discovery of ESI by Request for Production

Issuing Request for Production

A party may issue a demand to inspect, copy, test, or sample documents, tangible things, land or other property, and ESI that are within the scope of discovery, and that are in the possession, custody, or control of any other party to the action. CCP §§ 2031.010–2031.510.

The party demanding ESI **may specify the form or forms** to be produced. CCP § 2031.030(a)(2).

- **Objection:** a responding party may object to the specified form demanded, and, in its response state the form in which it intends to produce each type of information. CCP § 2031.280(c).



If the responding party objects to the requested form and provides discovery in another form, the receiving party may seek a court order compelling production in the desired format.

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- If no form is specified, the responding party shall produce the **form or forms in which it is ordinarily maintained or in a form that is reasonably usable**. CCP § 2031.280(d)(1).
 - “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.” CCP § 2031.280(e).

Responding to Request for Production

A responding party must respond separately to each item by any of the following (CCP § 2031.210(a)):

- A statement that the party will comply by the date set for the inspection, copying, testing, or sampling. (See CCP 2031.030(c)(2) (deadline to produce));
- A representation that the party lacks the ability to comply with the demand; or
- An objection to the particular demand.

The responding party must verify its response under oath unless the response only contains objections. CCP § 2031.250(a).

Objecting to Requests for ESI

Objection on ground that source is not reasonably accessible: A party may object to a demand for ESI on grounds that the requested ESI is from a source that is not reasonably accessible because of undue burden or expense. CCP § 2031.210(d).



To preserve this objection, the responding party must identify in its response the types or categories of sources of ESI that it asserts are not accessible. CCP § 2031.210(d).

A party from whom ESI is sought may seek a protective order based on this ground. CCP § 2031.060(c). (See discussion below under “Motion for Protective Order.”)



FRCP Rule 26 (b)(2)(B) provides that a party need not produce ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. To obtain discovery, the party seeking discovery must bring a motion to compel.

Objections to frequency and extent: “The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exist:”

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive. CCP § 2031.060(f)(1).
- The discovery sought is unreasonably cumulative or duplicative. CCP § 2031.060(f)(2).
- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought. CCP § 2031.060(f)(3).

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- 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. CCP § 2031.060(f)(4).

Other objections to burden, expense, or intrusiveness: A party may object to discovery on grounds that the burden, expense, or intrusiveness of the discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. CCP § 2017.020(a) (the court shall limit the scope of discovery if, pursuant to a motion for protective order, it determines that the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence).

- See Greyhound Corp. v. Sup. Ct. (1961) 56 Cal.2d 355, 383-384 (courts should weigh the relative importance of the information sought against the hardship entailed by its production in exercising their discretion to impose a protective order)
- See Calcor Space Facility, Inc. v. Sup. Ct. (1997) 53 Cal.App.4th 216 (trial judges must carefully weigh the cost, time, expense, and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed)
- Recall, however, that under California law, relevance is broadly construed. Unless otherwise limited by order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. CCP § 2017.010. Doubts as to relevancy should be resolved in favor of permitting discovery. Pacific Tel. & Tel. Co. v. Sup. Ct. (1970) 2 Cal.3d 161, 173. Relevancy to the subject matter is a broader concept than relevancy to the issues. Greyhound Corp. v. Sup. Ct. (1961) 56 Cal.2d 355, 390. Relevancy is determined by potential as well as actual issues in the case. Union Mut. Life Ins. Co. v. Sup. Ct. (1978) 80 Cal.App.3d 1, 10.

Privilege objections: because of the voluminous nature of ESI, there is a potentially heightened risk that privileged material may be disclosed in the production of ESI. Recall that CCP § 2017.010 limits discovery generally to matters that are relevant and “not privileged.” Consider the applicability of the following privileges and related discovery limitations:

- Attorney-Client Privilege (Evid. Code §§ 950-962);
- Attorney’s work product (CCP § 2018.010 *et seq.*);
- Clergy Penitent Privileges (Evid. Code §§ 1030-1034);
- Defendant’s sexual conduct limitations (CCP § 2017.220);
- Domestic Violence Counselor-Victim Privilege (Evid. Code §§ 1037-1037.8);

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- Financial affairs in punitive damages case (CC § 3295);
- Human Trafficking Caseworker-Victim Privilege (Evid. Code §§ 1038-1038.2);
- Income tax discovery limits (Rev. & Tax. Code § 19542);
- Insurance coverage limitations (CCP § 2017.210);
- Official Information and Identity of Informer (Evid. Code §§ 1040-1047);
- Physician-Patient Privilege (Evid. Code §§ 990-1007);
- Political Vote (Evid. Code § 1050);
- Privacy (Cal. Const., art. I, § 1);
- Privilege Against Self-Incrimination (Evid. Code § 940);
- Privilege for Confidential Marital Communications (Evid. Code §§ 980-987);
- Privilege of Defendant in Criminal Case (Evid. Code § 930);
- Psychotherapist-Patient Privilege (Evid. Code §§ 1010-1027);
- Sexual Assault Counselor-Victim Privilege (Evid. Code §§ 1035-1036.2);
- Spousal Privilege (Evid. Code §§ 970-973);
- Trade Secret (Evid. Code §§ 1060-1063).

Motion for Protective Order

The party to whom a demand has been directed, and any other party or affected person or organization, may move for a protective order. CCP § 2031.060(a). A motion for a protective order must be accompanied with a declaration stating facts showing a reasonable, good faith attempt at an informal resolution of any issue presented by the motion. CCP § 2031.060(a). The court, for good cause shown, may make any order that justice requires to protect any party or other person from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense. A non-exhaustive list of protective orders are described in CCP § 2031.060(b).

Protective Order For ESI Not Reasonably Accessible: A party seeking the protective order for ESI on grounds that the ESI is not reasonably accessible bears the burden of demonstrating that the information is from a source that is not reasonably accessible. CCP § 2031.060(c).

- Even if the responding party establishes the information is from a source that is not reasonably accessible because of undue burden or expense, the Court may order discovery if the demanding party shows **good cause, subject to limitations on frequency and extent**. CCP § 2031.060(d). (Limitations on frequency and extent are discussed above under the section “Objecting to Requests for ESI.”)
- A court that orders discovery of ESI from a source that is not reasonably accessible may set conditions for the discovery of the ESI, including allocation of the expense of discovery. CCP § 2031.060(e).



If the information is particularly important, the party seeking discovery may consider offering to assume all or most of the cost of production—thereby mooting the producing party’s expense argument.

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Conversely, if the information is particularly difficult to access or compile, the high cost of production, and the possibility of cost-shifting, may dissuade the demanding party from standing by its demand.



FRCP Rule 26 (b)(2)(B) provides that the court may specify conditions for the discovery. Federal courts have used this provision to allocate the expense of discovery.

Risk of Sanctions: The Court “shall impose a monetary sanction” against any party who successfully makes or opposes a motion for a protective order unless:

- The one subject to the sanction acted with substantial justification; CCP § 2031.060(h)
- Other circumstances make the imposition of the sanction unjust; CCP § 2031.060(h)
- The failure to provide ESI is due to loss, damage, altered, or overwritten data, the result of routine, good faith operation of an electronic information system. CCP 2031.060(i)(1)

Motion to Compel

If the responding party fails to serve a timely response to a Request for Production, the demanding party may move for an order compelling a response. CCP § 2031.300(b).

On receipt of a response to a Request for Production, if the demanding party deems that (1) a statement of compliance with the demand is incomplete, (2) a representation of inability to comply is inadequate, incomplete, or evasive, or (3) an objection in the response is without merit or too general, that party may move for an order compelling a further response to the demand. CCP § 2031.310(a)(1)-(3).

A motion to compel must:

- Set forth specific facts showing good cause justifying the discovery sought by the demand. CCP § 2031.310(b)(1).
- Include an accompanying declaration stating facts showing a reasonable good faith attempt at an informal resolution of any issue presented by the motion. CCP § 2031.310(b)(2).

California Rules of Court, Rule 3.1345 provides particular requirements for the motion, including the separate statement requirement.

Discovery of ESI by Subpoena

A party may serve a subpoena on a nonparty allowing the party to inspect, copy, test, or sample ESI. CCP § 1985.8(a)(1). The rules governing production of ESI by nonparties are similar to those governing production by parties.

- A party serving a subpoena requiring production of ESI may specify the form or forms for producing the ESI. CCP § 1985.8(b).

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- If a person responding to a subpoena for production of electronically stored information objects to the specified form or forms for producing the information, the subpoenaed person may provide an objection stating the form or forms in which it intends to produce each type of information. CCP § 1985.8(c).
- Unless the subpoenaing party and the subpoenaed person otherwise agree or the court otherwise orders, the following shall apply: (1) If a subpoena requiring production of electronically stored information does not specify a form or forms for producing a type of electronically stored information, the person subpoenaed shall produce the information in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable. CCP § 1985.8(d)(1).
- The subpoenaed person opposing the production, inspection, copying, testing, or sampling of electronically stored information on the basis that information is from a source that is not reasonably accessible because of undue burden or expense shall bear the burden of demonstrating that the information is from a source that is not reasonably accessible because of undue burden or expense. CCP § 1985.8(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 as to frequency and extent. CCP § 1985.8(f); see CCP § 1985.8(i) (frequency and extent limitations).

Cost Shifting: 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. CCP § 1985.8(g).

Data Conversion: If necessary, the subpoenaed person, at the reasonable expense of the subpoenaing party, shall, through detection devices, translate any data compilations included in the subpoena into a reasonably usable form. CCP § 1985.8(h).

Objections to Frequency and Extent: “The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that any of the following conditions exists:”

- It is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive. CCP § 1985.8(i)(1).
- The discovery sought is unreasonably cumulative or duplicative. CCP § 1985.8(i)(2).

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- The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought. CCP § 1985.8(i)(3).
- 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. CCP § 1985.8(i)(4).

Protections for Subpoenaed Party:

- Absent exceptional circumstances, the court shall not impose sanctions on a subpoenaed person or any attorney of a subpoenaed person for failure to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system. CCP § 1985.8(m)(1).
- A party serving a subpoena requiring the production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. CCP § 1985.8(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. CCP § 1985.8(l).