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PERSPECTIVE

Discovery 2020: The new frontier of e-discovery and early disclosure

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In an ongoing effort to increase cooperation and meet the changing face of litigation, members of the California Legislature have proposed several new or amended rules to update the Discovery Act. On January 1, 2020, five of those rules went into effect and each has a significant ramification in the world of civil litigation.

Gone are the days of hard-copy document dumps and last minute production of documents to avoid sanctions. Instead, 2020 is all about ease of exchange, early investigation, and disclosure. Here is a breakdown of the new rules and what they mean for your practice.

AB 1349 – Code of Civil Procedure §§ 2030.210 and 2033.210: Electronic Exchange of Discovery

Parties responding to requests for admission or interrogatories may now request that the discovery be provided in an electronic format. Similarly, upon receipt of responses, propounding parties may also request that the responses be provided in an electronic format. Following either such request, the other party has three (3) court days within which to comply. The parties may agree to produce the document(s) in any mutually accepted electronic format and by any method. If no agreement can be reached, however, then the electronic format must be plain text and the method of transmission will be e-mail.

Note, if the responding party requests and receives the interrogatories or requests for admission in electronic format, then the response must include the text of each interrogatory or request immediately before the response.

There is an exception: A party is not required to provide discovery in an electronic format if it was not created electronically. While specifically intended to exempt handwritten discovery by self-represented litigants, this also would apply to manually selected form interrogatories as well.

This is a small but effective change for making the discovery process more seamless and embracing an increasingly paperless work environment.

SB 370 – Code of Civil Procedure § 2031.280: Identifying Documents in Response to a Demand for Production

A party responding to a demand for production must now identify to which request each document responds and can no longer simply produce documents as they are kept in the usual course of business. A party may still produce electronically stored information in the manner in which it is maintained if the demand for production does not specify the format for production, but the request(s) to which it is responding must be identified somehow.

This amendment to the Code may have the most far-reaching consequences. Not only does it require counsel to spend additional time sorting through documents and identifying to which request or requests each document responds, but it also implicates questions of attorney work-product privilege in preparing responses. Starting early on a response to a request for production and seeking a protective order when necessary may be the answer to avoid spending hours of attorney work-product time differentiating burdensome document requests.

SB 17 – Code of Civil Procedure § 2016.090: Initial Disclosures

Taking a cue from the Federal Rules of Civil Procedure, SB 17 provides for verified initial disclosures of witnesses and documents outside the process of written discovery and with a continuing duty to supplement. At this time, this rule only applies when parties stipulate to initial disclosures and the court orders as such. There is no triggering discovery request.

In the event of stipulation and court order, and within forty-five (45) days of the court's order, the parties are required to provide: 1) contact information for all people likely to have discoverable information, including identification of what

that information is; 2) a copy or description of all documents or items in the disclosing party's possession, custody, or control which may be used in support of the party's case; 3) any agreement which may require an insurance company to pay or reimburse for a judgment, in whole or in part; and 4) the material provisions of any agreement which may require an individual or an entity to pay or reimburse for a judgment, in whole or in part. Witnesses, documents, or information that would be used solely for impeachment do not need to be disclosed.

Though called initial disclosures and intended to occur early in the case, there is no specific time prescribed by the statute for stipulating to the disclosures. A party is not permitted to evade making an initial disclosure because of defect in another party's initial disclosure or based on the status of case investigation. This, combined with the continuing duty to supplement either the initial disclosure or applicable discovery response(s) when new or different information is discovered, almost guarantees that there is no wrong time to initiate the disclosures.

Unlike in federal court, these initial disclosures in state court must be signed under penalty of perjury by the party, just like a discovery verification. The court is permitted to enforce the parties' obligations under this section on its own motion or by motion of a party to compel disclosure.

While not explicitly stated in the statute, it is highly foreseeable that a failure to supplement the disclosure or applicable discovery response(s) with witnesses or documents when they should have been uncovered will preclude a party from relying on them at trial. Consequently, early investigation of a case and identification of documents and witnesses by both the attorney and client is imperative to avoid potentially devastating consequences.

SB 17 – Code of Civil Procedure § 2023.050: Mandatory Sanctions

Sanctions of two hundred and fifty dollars ($250) are now mandatory for any party, person, or attorney who did not respond in good faith to a request for production or inspection demand; who produced documents within seven days before the scheduled hearing on the motion to compel; or who failed to meet and confer with the requesting party in a reasonable and good faith attempt to resolve the dispute. As is customary, sanctions can only be imposed after notice and an opportunity to be heard, and substantial justification or other circumstances making the sanctions unjust will act as a bar to the otherwise required imposition of sanctions.

The $250 likely applies per set of discovery and not per individual request for production, but beware, the court has the discretion to require a sanctioned attorney to report the sanctions to the State Bar. Further, the mandatory sanctions do not limit other discretionary sanctions that may be imposed.

Importantly, the mandatory sanctions apply to most requests for production or inspection, including subpoenas to third parties. This means that all clients, big and small, involved in litigation or not, should be warned of the consequences of failing to produce documents in good faith.

The requirements of exchanging electronic discovery, identifying documents to their corresponding request, and providing initial disclosures with supplementation of responses will further the aims of the Discovery Act to reduce the element of surprise. At the same time, the mandatory, and potentially reportable, sanctions should serve to discourage gamesmanship and encourage civility, resulting in increased cooperation between parties and/or counsel. Ultimately, the Discovery Act's greater emphasis on communication, early investigation, and preparing more thoughtful discovery responses in this new decade should improve the practice of civil litigation and expedite claims resolution opportunities. ■

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