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California litigants are now required to meet and confer regarding the discovery of electronically stored information before the initial Case Management Conference.

E-Discovery: New California Rule of Court Requires Advance Meeting and Planning

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On August 14, 2009, the California Judicial Council formally amended California Rule of Court 3.724, thereby requiring California litigants to meet and confer regarding the discovery of electronically stored information ("ESI").

As amended, the relevant portions of the newly enacted section 3.724 state:

> Unless the court orders another time period, no later than 30 calendar days before the date set for the initial 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: * * *
>
> (8) Any issues relating to the discovery of electronically stored information, including:
>
> (A) Issues relating to the preservation of discoverable electronically stored information;
>
> (B) The form or forms in which the information will be produced;
>
> (C) The time within which the information will be produced;
>
> (D) The scope of discovery of the information;
>
> (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.

Thus, the new rule creates a duty to meet and confer on ESI discovery issues before the initial case management conference, similar to the meet and confer requirements of Federal Rule of Civil Procedure 26(f)(3)(C).

In enacting this rule change, California's Judicial Council specifically intended to "ensure that parties and the courts address issues relating to electronic discovery early in the course of litigation."[1] The enactment of the new rule follows on the heels of the June 30, 2009, enactment of the California Electronic Discovery Act (the "California EDA"), that was designed to "modernize California's discovery law to reflect the growing importance of, and need for guidance in the handling of the discovery of electronically stored information." *See* Littler ASAP, *California Enacts New E-Discovery Rules that Mirror Federal Court E-Discovery Rules – with One Exception*, July 2009.[2] And while the California EDA contains provisions that require parties to meet and confer when disputes arise during a case before a dispute concerning ESI can be brought before a court, newly enacted section 3.724 requires parties to proactively address all potential issues concerning ESI at the outset of the case.

The newly enacted section 3.724 gives litigants a significant tool in their e-discovery arsenal. Through the mandatory meet and confer process, parties now have the opportunity to shape — from the outset of a case — how electronic discovery will be conducted. By meeting and conferring on these issues fully and in earnest[3] prior to the initial case management conference, litigants can propose a reasonable plan governing the discovery and production of ESI at the initial conference, and then subsequently insist upon compliance with the plan's limits once it is adopted by the court. Moreover, to the extent the parties disagree about issues surrounding things like the form of production of ESI, timeframes for the production of ESI, the scope of discovery of ESI, potential cost shifting for the discovery of ESI – including with respect to *mandatory* cost-shifting for producing ESI from back-up media,[4] and how to protect privileged or confidential ESI, those issues can be addressed with the court right away during the initial status conference. The court can then provide a ruling or other guidance on those ESI issues, which gives clear direction to all parties about how they should be handled, and avoids potentially time consuming and expensive side shows about them at a later point in the case.

With the amendments to section 3.724, litigants and their attorneys ignore issues related to the discovery of electronic information at their peril. This rule change, along with the enactment of the California EDA, signal that litigants in California state courts will be held increasingly more accountable for participating in the court's attempts to create protocols governing the preservation and production of ESI. Having been given the opportunity to address those issues at the outset of litigation via the meet and confer provisions of section 3.714, complaints made in the throws of litigation concerning the costs, substance, form, scope, or timing of electronic discovery are increasingly likely to fall upon deaf ears. Conversely, if taken seriously, the new meet and confer provisions should allow parties to save time and money that would otherwise be spent litigating needless discovery disputes over ESI.

Littler is one of the few firms in the Country that has a team of attorneys dedicated full-time to working with clients in the challenging field of electronic discovery, a move that clearly emphasizes the Firm's commitment to providing its clients with cutting-edge solutions in this rapidly developing area. Littler's E-Discovery lawyers provide focused guidance and expertise on all aspects of electronic discovery: from case- and client-specific advice about meeting preservation obligations; to working with Trial Teams to address "meet-and-confer" obligations; to developing strategies for efficient and effective data harvesting, analysis, review and production; to implementing cost-shifting/reduction strategies.

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[1] Judicial Council of California, Meeting Notes, August 14, 2009, p. 16, http://www.courtinfo.ca.gov/jc/documents/min081409.pdf.

[2] Citing California State Senate Judiciary Committee, Analysis of AB 5, June 9, 2009, http://info.sen.ca.gov/pub/09-10/bill/asm/ab_0001-0050/ab_5_cfa_20090608_120938_sen_comm.html.

[3] Because the amended rule specifically requires the parties to meet and confer in person or by telephone, boilerplate letters informing the other side that a party plans to seek ESI in discovery and demanding that the party impose a broad litigation hold on such ESI will likely be deemed insufficient.

[4] The California EDA specifically preserves mandatory cost-shifting for producing ESI from back-up media, as articulated by the California Appeals Court in *Toshiba v. Superior Court of Santa Clara County*, 124 Cal. App. 4th 762 (2004). *See* Littler ASAP, *California Enacts New E-Discovery Rules that Mirror Federal Court E-Discovery Rules – with One Exception*, July 2009.