

RESOLUTION 04-06-2007

DIGEST

Discovery: Electronically Stored Information

Amends Code of Civil Procedure section 2017.010 to include discovery of electronically stored information.

RESOLUTION COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 2017.010 to include discovery of electronically stored information. This resolution should be disapproved because the proposed language would not accomplish the goal of aligning the Discovery Act with similar provisions in the Federal Rules of Civil Procedures.

This resolution seeks to include electronically stored information in the Discovery Act because there is currently no section that specifically deals with electronically stored information. Although the theory behind the resolution is sound, the proposed language creates more problems than it solves. However, the proposed language needs a lot of revision to accomplish the proponent's goal. It is insufficient to merely include the proposed language in Code of Civil Procedure section 2017.010 without addressing all of the other potential issues that could or will arise with electronically stored information.

The proponent contends that the proposed language tracks the language in the Federal Rules of Civil Procedure (FRCP) with respect to electronically stored information. The FRCP, however, also addressed the potential problems with retrieval of such information, costs, abuse, etc, in a number of sections, rather than just adding electronically stored data to the type of information that is discoverable. For instance, rule 26(b)(2)(B) specifically states that "[a] party need not provide discovery of electronically stored information from sources . . . [for] undue burden or cost." Also, rule 26(b)(5) addresses the potential risk of privilege waiver and the time and effort required to avoid it.

The resolution does attempt to curtail possible abuses by the party seeking discovery by requiring that party to demonstrate that the electronically stored information is reasonably calculated to lead to the discovery of admissible evidence. However, it should be amended to better track the language of the FRCP or include other language to address the concerns raised by electronically stored information, such as scrubbing, metadata, issues of privilege, and the disparate levels of technology and availability among lawyers, firms and services. The Discovery Act should specifically include electronically stored information, but this resolution is insufficient to accomplish that purpose.

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2017.010 to read as follows:

1 §2017.010.
2 Unless otherwise limited by order of the court in accordance with this title, any party
3 may obtain discovery regarding any matter, not privileged, that is relevant to the subject
4 matter involved in the pending action or to the determination of any motion made in that
5 action, if the matter either is itself admissible in evidence or appears reasonably calculated to
6 lead to the discovery of admissible evidence. Discovery may relate to the claim or defense
7 of the party seeking discovery or of any other party to the action. Discovery may be obtained
8 of the identity and location of persons having knowledge of any discoverable matter, as well
9 as of the existence, description, nature, custody, condition, and location of any document,
10 tangible thing, or land or other property. Discovery may relate to electronically stored
11 information. Electronically stored information includes data or data compilations stored in
12 any medium from which information can be obtained, or translated if necessary by
13 responding party, into reasonably usable form. The electronically stored information can be
14 produced in the same electronic format used to generate the original data or data
15 compilation.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS:

Existing Law: Discovery can relate to things reasonably calculated to lead to the discovery of admissible evidence.

This Resolution: Would enable a party to conduct discovery on electronically stored information in a day and age where electronic devices and electronically stored information have become the mainstream way of doing business and communicating. This resolution is modeled after the recent amendments to the Federal Rules of Civil Procedure. A litigant would still need to demonstrate that discovery into the electronically stored information is reasonably calculated to lead to the discovery of admissible evidence.

The Problem: There is no statute in the Discovery Act expressly permitting discovery into electronically stored information.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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