

After Prior False Starts, California Adopts Comprehensive eDiscovery Rules

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On June 29, California Governor Arnold Schwarzenegger signed California's Electronic Discovery Act into law, *effective immediately*. The act contains comprehensive eDiscovery rules that largely parallel the now well-established Federal Rules of Civil Procedure, but with a very important difference.

In comparison to some other states, California is late to the eDiscovery table due to some prior false starts. Without a comprehensive set of rules, California has had a makeshift approach to electronic discovery by weaving such eDiscovery concepts into existing discovery law. *See, e.g.*, Cal. Civ. P. Code §§ 2016.020 (incorporates electronic data with term "writing" defined in Cal. Evid. Code § 250); 2017.710-2017.740 (enabling court to order use of "technology" in conducting discovery in complex cases).

In 2005/2006, the California Judicial Council drafted proposed eDiscovery amendments for the California Rules of Court, but on the eve of their scheduled adoption, put them on hold in order to evaluate the effect of the amended Federal Rules in practice. The California State Legislature then took up the cause over the ensuing years, but was met with a veto in the fall of 2008 when Governor Schwarzenegger deemed an earlier version of the Electronic Discovery Act as being not of the "highest priority" due to the state's 2008 budget crisis. Despite the eerily reminiscent circumstances of the state's current budget negotiations, Governor Schwarzenegger nevertheless signed this latest version of the act, with its urgency provision, into law.

The California Electronic Discovery Act bears substantial similarities to its Federal Rules counterpart:

- **Terminology** – Adopts the same terminology, i.e., "electronically stored information" or "ESI"
- **Format of Production** – Provides that the requesting party may specify the form in which the ESI is to be produced but permits the producing party to object and specify the form in which it intends to produce the ESI *so long as* it is in the form in which it is ordinarily maintained or in a reasonably usable format
- **Not Reasonably Accessible ESI** – Authorizes the producing party to withhold from production ESI that is not reasonably accessible on grounds of burden or expense, but

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