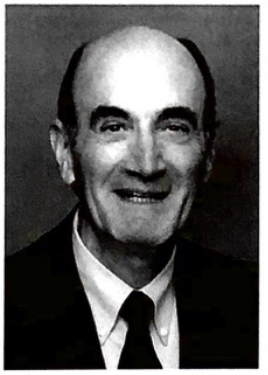
Recent Legislative Changes Affect Long-Standing Pre-Trial Discovery Practice



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By Hon. Allan Goodman, Judge of the Superior Court (Ret.)

Two legislative changes made in 2019 have immediate impact on pre-trial discovery practice in California state courts. The first affects how lawyers respond to pre-trial requests for production of documents. The second, initially a more modest change, may be the harbinger of far greater changes in discovery practices, changes which eventually may align discovery practices in state courts with those long required in federal court civil actions. (See Fed. Rules Civ.Proc., rule 26, 28 U.S.C.)

Responding to Requests for Production of Documents Other than ESI

The way to appropriately respond to your litigation adversary's requests for production of documents was changed by legislation effective January 1, 2020. Newly revised subdivision (a) of Code of Civil Procedure section 2031.280 requires that "[a]ny documents or category of documents produced in response to a demand for inspection, copying, testing or sampling shall be identified with the specific request number to which the documents respond." Eliminated from the former subdivision (a) is the option to respond by producing responsive documents as they are kept in the usual course of business. This new procedure applies in pending as well as newly filed cases. As discussed further below, no change was made in the subdivisions of section 2031.280 that apply to electronically stored information (ESI).

The changes that were made passed the California Senate 38 to 0 and the Assembly 77 to 0. The Senate Judiciary Committee analysis of the new legislation adopted the reasoning of two of the organizations sponsoring it: In their joint letter in support of the bill proposing the changes, California Defense Counsel and the Consumer Attorneys of California wrote that the legislation then being proposed would "streamline[] the process for the parties receiving this information and make[] litigation more efficient. Often litigants will produce a mass quantity of documents without specifying the category to which said documents are responsive. This leads to difficulty in determining whether responses were indeed submitted for each request." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 370 (2019-2020 Reg.

Sess.) April 30, 2019, pp. 2-3.) The advantage claimed for the new, limiting provision was that it "greatly benefits a requesting party, who will now be given clear guidance as to what documents are relevant to each of its specific demands." (*Id.* at p. 4.)

As the initial Senate committee analysis recognizes, "it should be noted that this will often place a heavier burden on the responding party, who must now more clearly articulate the connections between each document, or category or documents, and the relevant demands.... [¶] Ultimately, these changes will provide a more streamlined and responsive document production, if at the slight expense of the producing parties." (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 370 (2019-2020 Reg. Sess.) April 30, 2019, p. 4.)

Whether the burden on the responding party will be slight, as the committee report suggests, depends at least in part on the size of the responsive document production. The committee report on the new provision appears to assume that any increased burden on the responding party would not constitute an "unwarranted annoyance, ... or oppression, or undue burden or expense," to quote one of the principal bases for a request for a protective order in pre-trial discovery proceedings. (See Code Civ. Proc., § 2023.010, subd. (c).) Yet, in a wide variety of cases (e.g., many types of cases commonly litigated in independent calendar courts and in class actions) there are, typically, large numbers of responsive documents, making compliance with the newly revised statute a daunting task. (Indeed, an entire industry already exists to help lawyers manage the burden of searching for and identifying documents potentially and actually responsive to pre-trial requests for production.)

Which party actually will bear the cost of complying with the new restrictions on the manner of responding to requests for production of documents may ultimately be determined by a court if, or when, the court is presented with a motion for a protective order by a responding party seeking to shift, or have the requesting party share in, the costs of compliance with a request for production of documents. (See Code Civ. Proc., § 2031.060, subd. (b).)

Going forward, and subject to the need for court assistance with requests for production that are considered to be "unreasonably burdensome," how is the responding party to comply with the revised statute? Must documents responsive to more than one of the typically numerous requests for production be identified and produced separately in response to each of the several requests to which it may be responsive? Is there a less repetitive means to comply with the new statute's mandate?

While there is no clear guidance at present given the recent effective date of the new statute, the sole change made in the wording of SB 370 between the time of its introduction and its passage suggests the answer. For many years, section 2031.280, subdivision (a) had provided that "[a]ny documents produced in response to a demand for inspection, copying, testing, or sampling shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand." SB 370, as introduced, in addition to deleting the option for production "as [the documents] are kept in the usual course of business," proposed that the responsive documents "shall be *organized and labeled* to correspond with the categories in the demand." (SB 370, as introduced Feb. 20, 2019, italics added.) This language may have required assembling all of the documents responsive to each request; thus, if documents were responsive to more than one request, they

would need to be produced multiple times, once for each request to which they were responsive. By the time the bill emerged from the Senate Judiciary Committee, this clause had been reworded to read, "shall be *identified with the specific request number* to which the documents respond." (SB 370, as amended April 11, 2019, italics added.)

This change in wording may be considered to be significant: Instead of the repetitive production indicated by the original language of SB 370, it appears that a document production may qualify if it contains the universe of documents *accompanied by* a table or schedule which correlates by document name(s) and page number(s) the documents responsive to each of the requests for production to which it is responsive, thus eliminating the need for multiple productions of the same document(s). (For ease of use by all parties, the universe of documents produced would be sequentially numbered.)

The party responding to a request for production must keep in mind other statutory requirements, including the obligation to respond separately to each item or category in the request for production; to state whether the party will comply in whole or in part and whether it lacks the ability to comply; or state if it objects and, if so, state the objection and its bases. (Code Civ. Proc., §§ 2031.210, subd. (a) & 2031.220.) If the responding party claims an inability to comply, it must also explain the reason, e.g., that the documents do not exist, were destroyed or lost, or are not within its custody or control. (§ 2031.230.)

When the Legislature made the changes described above in SB 370, it did not change the requirements for production of ESI, which appear in other subdivisions of the same statute. Those provisions had been enacted in 2009 when the Legislature addressed issues that had long existed with respect to discovery of ESI. (Stats. 2009, ch. 5.) In addition to adding specific provisions for discovery of ESI (e.g., Code Civ. Proc., § 2031.280, subds. (c)–(e)), at the same time the Legislature added specific provisions for issuance of protective orders in connection with its production (Code Civ. Proc., § 2031.060, subds. (a)–(f)).

Some have argued that the change eliminating the option of production as the responsive documents are maintained in the ordinary course of business also applies to ESI. If so, that could substantially increase the burden in responding to document production requests for ESI, for example, based on how paper records were converted and stored as ESI. Subdivision (d) of section 2031.280 authorizes production of ESI "in the form or forms in which it is ordinarily maintained or in a form that is reasonably usable" unless the parties agree otherwise or a court orders production in a different manner. The circumstance that the Legislature made no changes in this or other subsections of section 2013.280 that apply specifically to ESI at the time it changed the manner of compliance for traditional documents supports the argument that there was a conscious decision to continue to allow ESI to be produced in the same manner as before the change to subdivision (a) of section 2031.280. Had the Legislature wished to have the change to subdivision (a) apply to ESI in subdivision (d), the opportune time to do so would have been when it amended subdivision (a) of the same statute. Its silence on this point may "speak volumes." Thus, it appears that ESI may continue to be produced as has been prescribed since 2009.

The protective order provisions applicable to requests for production of documents were not changed in the 2019 Legislature. Thus, in the event a request for production

of documents, including ESI, is made, and objected to by the responding party, the Code of Civil Procedure provides a means to resolve the conflict. Setting aside the likely inquiry from the judge supervising discovery as to the depth of the parties' predicate mandatory meet and confer efforts, section 2031.060, subdivision (b) sets out the court's authority to "make any order that justice requires to protect any party ... from unwarranted ... burden and expense." (See also *Id.*, subds. (d)–(f) [added in 2009 to apply specifically to disputes involving production of ESI].)

A Modest Approach to Accelerating Pre-Trial Discovery

For decades, the Federal Rules of Civil Procedure, or many district courts' local rules before that, have provided for early, extensive, and attorney-initiated mandatory disclosure of all types of discovery between litigants without the prior issuance of formal requests for discovery by any party. (See Fed. Rules Civ. Proc., rule 26, 28 U.S.C. & former U.S. Dist. Ct., Local Civ. Rules, Central Dist. Cal., rule 3(e).)

In 2019, a bill (SB 17) was introduced in the California Senate that "models the Federal Rules of Civil Procedure" in certain respects. One of the Senate committee reports speaks broadly — and in critical terms — of the difficulties in obtaining pre-trial discovery, a circumstance with which litigators are quite familiar. In fact, however, the descriptions of this process in these committee reports went far beyond the actual impact of the legislative proposal, both as introduced and as enacted. Originally, the legislative proposal only added a provision making $1,000 sanctions orders mandatory in certain discovery disputes. The bill was then amended to also provide that, within 45 days after service of the answer in civil actions (other than in unlawful detainer actions) and without awaiting a request, each party would be "required" to make extensive initial disclosures of information of all types then reasonably available to it. But this provision applied only if the parties first agreed to do so and the court entered an implementing order. (SB 17, as chaptered at Stats. 2019, ch. 836, §§ 1, 2 adding §§ 2016.090 & 2023.050 to Code Civ. Proc.; see Sen. Com. on Judiciary, Analysis of Sen. Bill No. 17 (2019-2020 Reg. Sess.) Apr. 11, 2019, p. 1 & *passim*.)

As SB 17 emerged from the Legislature and was sent to the Governor, the $1,000 sanction was reduced to $250, to be assessed "in addition to any other sanction imposed" in connection with requests for production of documents. (The statute can be read as making the $250 amount mandatory in the event the court imposes other "sanctions"; Code Civ. Proc., § 2023.050, added by SB 17, as chaptered at Stats. 2019, ch. 836, § 2.)

Also, the comparison with Federal Rule 26 was generous: The requirement for mutual, early production of matter otherwise left to traditional California document discovery procedures, was — and in the statute enacted is — only effective if the parties stipulate to use it and they also obtain an order from the court in which their action is pending.

There are cogent reasons for parties to adopt the new procedure, including the potential for lawyers to save their clients considerable time and expense in obtaining materials that to this point have been extracted from opponents only after propounding — and eventually enforcing — document discovery requests. Lawyers should also understand that the language of the Senate Committee reports carries the implication that if the voluntary procedure is not embraced, there may be further movement to more closely align California pre-trial discovery practice with its federal court counterpart.