

ELECTRONIC DISCOVERY: Will you Byte?

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Introduction

Electronic data has emerged as a critical source of evidence and has changed the way discovery materials are gathered and managed. Increasing numbers of companies rely on e-mail for exchanging privileged and confidential information with colleagues, suppliers, distributors, partners, legal advisors, accountants, and others.¹ With the advent of electronic mail, organizations have moved away from paper and telephone based transactions, thereby avoiding delays associated with travel, missed phone calls, and paper trials.² Due to this increased use of computer technology as a means of communication, electronically stored data has become a prime source of evidence in aviation litigation.³ Surveys now reveal that approximately 30% of all current civil discovery requests involve electronically stored data.⁴ This percentage is certainly higher in aviation litigation.

Technological advances, including sophisticated e-mail systems/servers and desktop internet access have made the use of electronic communication more prevalent than ever before. Most businesses utilize electronic communication for confidential and sensitive information. Other documents, including contracts, budgets, and meeting minutes, are frequently reviewed, revised, approved, edited and e-mailed to numerous recipients without ever being printed. The various drafts and versions of these documents (sometimes with electronic redlined notes) along with corresponding backup copies may be stored on a companies' computers' hard drives and/or backup tapes for years.⁵

Electronic documents are becoming ever more ubiquitous and so has their use in litigation. By way of example, in the antitrust lawsuit brought by the U.S. Department of Justice against Microsoft, a number of Bill Gates' e-mails were used against him as evidence of alleged illegal activity. Although these e-mails were embedded in what must

¹ See Intrust Technologies Security Products Solutions - e-mail (<http://www.intrust.com/products/e-mail/allaboutemail.htm>)

² See id.

³ See Corinne L. Giacobbe, note, *Allocating Discovery Cost in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 Wash. & Lee L. Rev. 257, 258 (2000), (citing Ron Chepesiuk, *Trial by E-mail*, Student Law Sept. 1998 at 31-32)

⁴ See id.

⁵ See <http://www.applieddiscovery.com/lawlibrary/whitepapers>

have been billions and billions of bytes on his hard drive, and within Microsoft's network, they were easily searched out with text search software that lawyers use as bloodhounds to sniff out relevant evidence.⁶ For a second example, in a recent case, a woman brought a suit against her former employer for age discrimination after being fired. Initially, her lawsuit appeared unlikely to succeed because the employer had carefully handled the termination following the guidelines outlined by a human resources professional. The company expected to quickly dispose of the case or at most, settle for nuisance value. During discovery, the woman's attorney hired a computer consultant who specialized in retrieval of e-mail. The consultant examined the company's computer system, salvaged a deleted message from the company's president to the head of the personnel department, and passed this on to the woman's attorney. In the e-mail, the president used blatantly discriminatory language to order the woman's termination. Following the discovery of the message, the company settled the case for \$250,000.⁷

The purpose of this article is to alert ABC assureds and their brokers to the issues presented by electronic discovery and provide suggestions as to how they may prepare for it when faced with litigation.

What are Electronic Documents?

At the outset, it is important to define what "electronic" documents are. Electronic documents/evidence have been defined as "information stored in electronic form that ... is relevant to the issues in a particular litigation."⁸ The terms "electronic," "digital", and "computer-based" are used interchangeably in most of the literature and industry. These terms commonly refer to information that is created or stored or best utilized on computers in digital form. The most common applications used in industry are word processing, (programs such as WordPerfect or Word), spreadsheets (such as Excel), and databases. Digital information is generated, transferred, stored, and retrieved

⁶ See, e.g. James V. Grimaldi, *Microsoft Trial-Gates' Spat with Intel Is Revealed by E-mail*, Seattle Time, June 23, 1999 at E 1. Other cases involved incriminating e-mail: See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1019 (9th Cir. 1997) (O'Scannlain, J., concurring in part) (noting, in an ERISA decision, that freelancers are treated differently from employees because, among other thing, freelancers had different e-mail addresses); *Meloff v. New York Life Ins. Co.*, 51 F.3d 372,373, 376, (2d Cir. 1995) (denying summary judgment in libel suit based in part on e-mail evidence); *Owens v. Morgan Stanley & Co.*, No. 96 Civ. 9747 1997 WL 793004 (S.D.N.Y. Dec. 24 1997) involving suit by two African-American employees against a large investment banking firm that allegedly circulated racist e-mail message among white employees); *Angleton v. Beech Aircraft Corp.*, No 96-1027-JTM, 1997 WL 446262, at *2 (D. Kan. July 30, 1997) (involving e-mail sent by plaintiff to supervisor).

⁷ See Heidi L. McNeil & Robert M. Kort, *Discovery of E-mail*, Or. St. B. Bull., Dec. 1995, at 21.

⁸ Michael R. Overly, *Overly on Electronic Evidence in California*, section 1.01, at 1-2 (1999).

from many devices such as desktop and laptop computers, printers, fax machines, digital telephones, digital pagers, and hand-held personal digital assistance like Palm Pilots.

What Are Bytes?

It is helpful to have a very basic understanding of how computers work and to understand the transformation of information from a “man-readable” format (e.g. English), into an electronic format, and how that information is stored. First, almost all electronic information is stored in the form of binary numerals. Text, sound, and pictures (or graphic files) are all reduced to zeros and ones. While somewhat simplistic, it is enough here to know characters and numerals are represented in a computer by a series of zeros and ones. At a very basic level, computers are nothing more than a collection of organized switches operating at incredibly high speeds manipulating the zeros and ones. These switches have only two settings, on and off. Computer operations are a result of controlling these huge number of switches. Microscopic electronic devices called transistors are used to perform switching functions. Approximately 16 million transistors can be put into a chip the size of a thumbnail, and microchip designers (such as Intel) regularly find ways of adding more transistors to memory chips. In fact, computers may soon use transistors built on a molecular scale, radically increasing the number of switches that can fit onto a single chip.⁹ Bits are the fundamental building blocks of electronically stored information. In technical terminology, eight bits comprise one “byte” of storage capacity or memory. Floppy disks, commonly used a decade ago, were capable of storing approximately 180 pages of text. Today’s CD-ROM disk can store approximately 325,000 pages of text. Many hard drives can store up to 2 million pages of text.¹⁰ Therefore, the sheer volume of discoverable electronic evidence poses logistical challenges to lawyers and parties. Naturally, the trend is toward even greater computer storage capacity.

Discovery of Electronic Documents

Federal Rule of Civil Procedure 34 provides for discovery of documents and other information from opposing parties. Historically, “documents” were interpreted to mean tangible paper documents. The text of Rule 34 was amended in 1970 to provide for electronic discovery by permitting the discovery of any “data compilations from which information can be obtained, translated, if necessary, by the respondent, through detection devices into reasonably useful form”.¹¹

The Manual for Complex Litigation also addresses the process for discovery of electronic data in litigation. The Manual advises that “any discovery plan *must* address

⁹ See, <http://www.techweb.com/wire/story/twb19991014S0001>.

¹⁰ See Overly, *supra* note 8, section 1.01 at 1-3

¹¹ Fed. R. Civ. P. 34 (a).

relevant issues, such as the search, location, retrieval, form of production and inspection, preservation, and use at trial of information stored in mainframe or personal computer or accessible online.” (emphasis added)¹² Therefore, in litigation deemed complex, a discovery plan for electronic discovery is required.

Further, courts have interpreted similar statutory provisions stating that “it is black letter law that computerized data is discoverable if relevant.”¹³ Courts have also said that “computers have become so commonplace that most court battles now involve discovery of some type of computer stored information.”¹⁴ Another court noted that “there is nothing about the technological aspects involved which renders information stored in an electronic media ‘undiscoverable’”.¹⁵ Accordingly, one may reasonably infer that courts will give a wide berth to reasonable requests for electronic discovery.

Types Of Electronic Evidence

Given that most courts will entertain broad requests for electronic discovery, what types of electronic evidence are available to discover?

Active Data

Most desktop computers store data on removable disks, internal hard drives and/or CD-ROM devices. Further, the trend is to store information on DVD-ROMS (historically known as digital video disk and now called digital versatile disk) which further expand storage capacity. Laptops, hand held computers, and Palm devices also store information in memory cards. Networked computer systems store data on large hard drives and copy the information stored on their system to a backup system on a regular basis to guard against accidental loss of data. Individual users and businesses can backup their stored data by sending their files over the internet to a third-party’s computer. This means that a backup copy of information stored on a computer in Los Angeles may exist in a separate storage device located in New York. In fact, several companies offer computer users free storage space on their websites.¹⁶

¹² See Manual For Complex Litigation 21.446 (3d ed 1995)

¹³ *Anti-monopoly, Inc. v. Hasbro, Inc.*, 94 Civ. 2120, 1995 WL 649934, at 2 (S.D.N.Y. Nov. 3, 1995).

¹⁴ *Bills v. Kennecott*, 108 FRD. 459,462 (D. Utah 1985).

¹⁵ *Linnen v. A.H. Robbins, Co., Inc.* No. 97-2307 1999 WL 462015, at 6 (Mass. super ct. June 16, 1999 involving of nearly 1,000 backup tapes.)

¹⁶ See www.i-drive.com; www.docsspace.com; and www.filemonkey.com

At this point, the reader may be asking, “So why all the hullabaloo? If it is subject to discovery, why not just print it out?” First, much of the information is never printed out, nor is it intended to be printed out. The information simply can’t be represented on paper. One example of this is a computer spreadsheet. If the spreadsheet is printed out, only a portion of the information used to create the spreadsheet is made available. Every cell has behind it formulae, instructions, and relationships to other cells that are not readily apparent. Electronic discovery usually makes this information available.

E-mail and word processing files, both critical types of electronic documents in discovery, contain what is called “metadata” which originates from the Greek meaning “information about information”. Metadata does not appear in a printed document. Often, from an original electronic version, you can get the original author, date, time of creation, how the document was edited and routed, and sometimes earlier versions of the document. This is only some of the information available as metadata. In years past, this material was usually not requested during discovery. However, anyone who requests electronic discovery today would be a fool not to ask for it. Conversely, a responding party would be foolish not to look at it very carefully before producing same.¹⁷

Litigants should take note that, “[a] request for raw information in computer banks [including metadata] is proper and the information is obtainable under the discovery rules.”¹⁸ In fact, courts sometime order the parties to permit counsel (and their computer forensics expert) to physically search through a responding party’s computer system to obtain active data.

While the above examples are fairly routine in electronic discovery, there are a number of locations where responsive electronic data may be found, which are not so obvious.

Replicant Data

Almost all routine computer operations involve file replication. Whenever you use a computer, you are creating replicas of records without consciously doing so. Whenever computer files are created, opened, viewed, edited, copied, printed, e-mailed, or faxed, the computer system makes a record or log of the activity. Think of this in terms of a conventional file cabinet which could tell you who has reached into the drawer and what they did. Computers log activity of this sort routinely and this opens up a whole new area of available information.¹⁹ Lawyers will often use this information to cross-examine a witness during deposition or trial.

¹⁷ See <http://www.kenwithers.com/articles/sandiego/slide09.html>

¹⁸ *Santiago v. Miles*, 121F. L.D. 636,640 (W.B.N.Y. 1988); see also *Crown Life Insurance Co. v. Craig*, 995 F2nd. 1376, 1382-1384 (7th 1993)

¹⁹ See *Id.* at note 16.

Further, it is critical to remember that from an electronic discovery standpoint, documents that were never “saved” may still exist on the computer’s hard drive and may be discoverable. Most users have experienced slight pauses in processing when typing in a word processing program. These processes are often automatic backups to applications in the event of system failure. Each time this backup occurs, a “file clone” is created and stored.²⁰ On many networks, these file clones are saved to a user’s hard drive. In addition, data that is sent to a printer, while not saved, may be stored in a printer’s buffer, which may also be recoverable.²¹ Bottom line, while a user may believe the document was purged from the system, several copies may be residing on the hard drive or other places on the network.

Obviously, another fertile area for electronic discovery is backup tapes. A simple definition of backup data is “information copied to removable media in order to provide users with access to data in the event of a system failure.”²² Companies often have a formal backup policy wherein the company’s computer system is “backed up” on a regular basis and then warehoused for a certain period of time. By reviewing backup tapes, plaintiff’s counsel are often able to assemble a chronology - say a communications trail regarding development of a certain aviation product - that otherwise would have been beyond reconstruction.

Residual Data

As alluded to earlier, when a computer user presses the “delete” key on his/her keyboard, the document is not really “deleted”. Hitting the “delete” button merely instructs the computer to write over the hard disk space that contains that particular file. Often “deleted” files are only partially overwritten which may enable a plaintiff’s counsel’s computer reconstruction forensic expert to recover the remaining parts of a document.²³ Also, at least one court has found that computer files including deleted documents that can be recovered are discoverable.²⁴ Bottom line - litigants required to produce a “copy” of a hard drive should retain an expert themselves to review potential residual data before producing same. Also, several commercial software programs are available which “overwrite” deleted files, essentially purging the residual data.

Costs Involved in Electronic Discovery

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- ²⁰ See Joan E. Feldman and Larry G. Johnson. Lost? No. Found? Yes., *Bus L. Today*, May-June 1999.
- ²¹ See Mark D. Robbins, Computers and the Discovery of Evidence - A New Dimension to Civil Procedure, 17 *J. Marshal J. Computer& Info. L.*411-413 (1999).
- ²² See *id.* at 19.
- ²³ See Generally Charles A. Lovell & Roger Holmes - The Dangers of E-mail: The Need for Electronic Data Retention Policies, 44 *R.I.B.J.*, Dec. 1995, at 7-8.
- ²⁴ *Simon Property Group v. MySimon, Inc.* 194 F.R.B. 639 (SD) Ind. (2000)

Well, one might ask, who pays for all this technological wizardry?

Electronic discovery involves costs without parallel in conventional paper discovery. Generally, the costs follow the same general principals of paper discovery. However, preparing to produce documents electronically can be costly.

First, the responding party must locate the responsive active data in myriad of possible locations and take action to segregate and preserve it before it inadvertently becomes altered or damaged. Obviously, a company's computers are being used all the time by perhaps hundreds or even thousands of people and inadvertent alteration or destruction of live data is a real possibility.

Next, all the inactive data must be restored to a format and system that is usable. Take a typical case where a company has five servers, each backed up monthly, for 10 years. This would mean 600 monthly backup tapes, which cost roughly \$1,000 each to restore. In such a case, a litigant would face an expense of \$600,000 before they could even determine whether any of the data were relevant to the litigation. Obviously, this type of situation should foster immediate negotiation and potential motion practice to limit scope. In fact, courts have ruled "plaintiffs are not entitled to unbridled access [of] a defendant's computer system ... [they] should pursue other less burdensome alternatives."²⁵ Similarly, another court ruled that while the plaintiff's request to search a defendant's computer system was within the scope of the discovery rules, the inspection sought was overly broad since it would have given the plaintiff unfettered access to defendant's entire computer system which could cause defendant irreparable harm.²⁶ Also, it is important to remember Federal Rule 26(b)(2)(i-iii). These are the "proportionality standards" limiting the scope of a request for production during the discovery process.

Next, when the documents are in a readable format, and before they can be produced, the electronic documents need to be searched and vetted for privilege -- just like paper documents. Courts have recognized the need to preserve the attorney-client privilege and work product doctrine objections in production of electronic discovery.²⁷ Each document must be screened individually. In jurisdictions with a strict view of inadvertent waiver of privilege (which thankfully is a severe minority), this task must be done with exacting detail and can easily become a very costly phase of discovery.

Last, the relevant and non-privileged data must be produced to the requesting party. This often involves creating images of the electronic documents in an agreed upon

²⁵ *Van Westrien v. Americontinental Collection Corp.*, 189 F.R.D. 440, 441 (D. Ore. 1999).

²⁶ *Strasser v. Yalamanchi* 669 So. 2d 1142, 1144-45 (Fla. Dist. Ct. App. 1996)

²⁷ *See IBM Corp. v. Comdisco, Inc.* C.A. No. 91-C-07-199-1992 W.L. 52143 at 2 (Del. Super. Ct. March 11, 1992)

format. It is important to agree, in the first instance, to one electronic format and stick to it throughout the case. Converting to various formats mid-cycle adds costs.

Litigants should note that where the electronic discovery is deemed unduly burdensome or expensive and the parties' resources are disproportionate, the possibility exists that a court may order an allocation of costs.²⁸ In fact, one court has found that the requesting party must bear costs of having a forensics expert make a mirror image of the defendant's hard drive.²⁹

Being Prepared for Electronic Discovery

If an ABC assured is involved in litigation, a request for electronic discovery is extremely likely. Therefore, what can ABC assureds do to put their companies in the best position for the eventuality of responding to a request for electronic discovery? It is the author's opinion that e-mail is likely the most fertile ground which a plaintiff's lawyer may till for ammunition in a products liability lawsuit. Hence, it is important that ABC assureds develop company e-mail and internet policies. The policy should state:

1. That the extent of usage allowed is limited -- it should specifically state the restrictions on use of e-mail and internet;
2. that the system is the sole property of the employer;
3. that e-mail messages are not private. (In fact, courts have ruled that an employee has no reasonable expectation of privacy in e-mails sent over the employer's system;³⁰)
4. that the company has right to monitor e-mail usage;
5. that the company prohibits harassing or defamatory messages;
6. that the company prohibits solicitation for non-business purposes;
7. that the company prohibits transmission of trade secrets/confidential information;
8. that the company prohibits copying/distribution of copyrighted material;
9. that the company prohibits chain mail;
10. and, that the company strongly discourages arguing a point over e-mail and prohibits it if it relates to a design or product integrity issue.

As has been discussed, employee e-mail is frequently used against a company. However, depending on a company's internal policies a company may not be in a position to introduce a comparable message (offensively) if the e-mail communications fail to

²⁸ See Manual for Complex Litigation 21.433 (3d ed. 1995). Also see *Oppenheimer Funds, Inc. v. Sanders*, 437 US 340-342 (1978).

²⁹ See *Playboy Enterprises v. Welles*, 60F. SUPP. 2nd 1050 (S.D. Cal. 1999)

³⁰ See *Smith v. Pillsbury Co.* 914 f supp. 97 (E.D.Ta. 1996)

satisfy the requirements for a “business record” under the Federal Rules of Evidence.³¹ Companies should consider adopting an e-mail “system”, rather than merely a policy. A system implies the use of technology to automatically purge all historic e-mail. The company should consider adopting an e-mail policy intended to delineate *official* company e-mail -- which should be treated as a paper document and subject to regular document retention policies -- and personal or *unofficial* e-mail, which should be routinely deleted. Further, by defining and distinguishing between official and unofficial e-mail, companies minimize the risk that unauthorized communications among employees could later be used against the company in litigation. Alternatively, a company may wish to designate two e-mail systems. One for official business and another for personal and administrative communications. Obviously, the personal/administrative e-mails could be deleted (depending on the volume of e-mail traffic) in a time period as short as a day, week, or month. E-mail regarding official business could be retained pursuant to a separate provision in the company’s record retention policy given applicable regulatory requirements which are often at issue, especially in aviation.

The general concept to be transmitted to all employees is to use common sense. The company should advise users to think about how what is being written would sound before a jury, to be factual and not speculate.

Of course, a workable document retention policy that “involves the systematic review, retention, and destruction of documents received or created in the course of business” is essential to be prepared for litigation.³² In terms of a record retention policy, the *Linnen v. A.H. Robbins* case is widely cited.³³ Here, defense counsel stated “that after several investigations in response to repeated requests for production, the defendant had produced all their responsive e-mail.” Later, the plaintiffs deposed the chief information officer, who stated absolutely that the defendant corporation had followed its record management plan, destroyed pre-litigation backup tapes in the normal course of business, and that there was nothing more. Later, the plaintiffs deposed another person in the computer department in charge of the e-mail system. This witness did not know anything about a records retention policy, normally did not destroy anything, and had 700 backup tapes in a storeroom that were in the process of being overwritten. A very angry state court judge announced that a spoliation inference would be in order if the case ever came before a jury, which it did not. Obviously, it is important to get a firm grasp of the computer system early in the case before any damage can be done, and ...find the person with keys to the storeroom.

³¹ See *Monotype Corp. PLC v. International Typeface Corp.* 43 F 3rd 443, 450 (9th Cir. 1994).

³² See *Christopher v. Cotton*, Document Retention Programs for Electronic Records: Applying a Reasonable Standard to the Electronic Era, 24 J. Corp. L. 417 419-20 (1999)

³³ *Linnen v. A.H. Robbins Co., Inc.* 10 Mass. L. Rptr. 189 (1999).

The Role of an Competent Expert

Computer discovery experts are often deeply involved in day to day conduct of litigation.

At ground level are the system experts. These are the people who know the computer systems used and are often employees of the ABC assured. They know how e-mail servers are set up, what the backup procedures are, and how the operating system deals with various files. At mid-level are electronic discovery experts. These are usually experts brought in by defense counsel to automate the discovery process. These people help prepare the case for an electronic courtroom. At the top level of electronic discovery are computer forensic experts. They specialize in recovering deleted files, restoring damaged data, and finding “hidden” documents and information. In the normal course of civil litigation, it is usually inadvisable for the experts from the various sides to consult with one another during the discovery process or before their depositions. However, in electronic discovery, the parties should consider allowing the various consulting experts to talk to each other and work out arrangements whereby they can cooperate (regarding a myriad of topics such as format, and exchange protocol) without waiving work product protection.

Responding to an Electronic Discovery Request -- Conducting a Reasonable Good Faith Discovery Search

When an ABC assured is faced with an electronic discovery request, Mendes & Mount, LLP will work with the assured to make a reasonable good faith discovery search for the requested documents. The process is not particularly different from responding to a standard request for a production of documents. Some items to keep in mind when responding to a request for electronic discovery are:

1. Identify key personnel with relevant information. Search their hard drive, laptop, home computer, and, if used for business, hand held devices (Palm Pilots) and network files.
2. Identify types of documents relevant and relevant time periods.
3. If relevant documents were purged, search system and backup tapes for those documents.
4. Send notice to employees regarding the duty to preserve required evidence and to suspend normal business procedures that alter or destroy relevant electronic documents.³⁴

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Prudential Insurance Co. of America Sales Practices Litigation, 169 F.R.D. 598 (N.J.D. 1997); Turner Hudson Transit Lines, 142 F.R.D. 68,72 (S.D.N.I. 1991)

Conclusion

Certainly, technology has changed the landscape of discovery. Often the operative question is what can a litigant get out of computers at a reasonable cost. Obviously, in major air crash litigation, the plaintiffs' steering committee will often spend tens of thousands of dollars on electronic discovery. These costs are in addition to those involved in presenting the evidence in an "electronic courtroom". Meanwhile, courts continue to allow and expand the use of electronic discovery as technology continues to evolve. Accordingly, ABC assureds should review their record retention policies in light of some of the issues raised herein. Attached hereto are two appendices of proposed California statutes regarding electronic discovery. The first, Appendix I, provides statutory authority for some of the concepts outlined in this article. The second, Appendix II, deals with remote electronic appearance at depositions.

Note: The information contained in this article is general in nature and does not constitute legal advice. These materials are merely intended to provide an overview and points of discussion regarding the topics addressed. Should ABC assureds have a particular issue of concern, the advice of Mendes & Mount, LLP and competent counsel licensed to practice in your jurisdiction should be sought.

APPENDIX I

PROPOSED STATUTE

CALIFORNIA CCP §2017 (e)

(e) (1) Pursuant to noticed motion, a court may enter orders for the use of technology in conducting discovery in cases designated as complex pursuant to Section 19 of the Judicial Administration Standards, cases ordered to be coordinated pursuant to Chapter 3(commencing with Section 404) of Title 4 of Part 2, or exceptional cases exempt from case disposition time goals pursuant to Article 5(commencing with Section 68600) of Chapter 2 of Title 8 of the Government Code, or cases assigned to Plan 3 pursuant to paragraph (3) of subdivision (b) of Section 2105 of the California Rules of Court. In other cases, the parties may stipulate to the entry of orders for the use of technology in conducting discovery.

(2) An order authorizing that discovery may be made only upon the express findings of the court or stipulation of the parties that the procedures adopted in the order meet all of the following criteria:

(A) They promote cost-effective and efficient discovery or motions relating thereto.

(B) They do not impose or require undue expenditures of time or money.

(C) They do not create an undue economic burden or hardship on any person.

(D) They promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to the litigants.

(E) They do not require parties or counsel to purchase exceptional or unnecessary services, hardware, or software.

(3) Pursuant to these orders, discovery may be conducted and maintained in electronic media and by electronic communication. The court may enter orders prescribing procedures relating to the use of electronic

technology in conducting discovery, including orders for the service of requests for discovery and responses, service and presentation of motions, production, storage, and access to information in electronic form, and the conduct of discovery in electronic media. The Judicial Council may promulgate rules, standards, and guidelines relating to electronic discovery and the use of such discovery data and documents in court proceedings.

(4) Nothing in this subdivision shall diminish the rights and duties of the parties regarding discovery, privileges, procedural rights, or substantive law.

(5) If a service provider is to be used and compensated by the parties, the court shall appoint the person or organization agreed upon by the parties and approve the contract agreed upon by the parties and the service provider. If the parties do not agree on the selection, each party shall submit to the court up to three nominees for appointment together with a contract acceptable to the nominee and the court shall appoint a service provider from among the nominees. The court may condition this appointment on the acceptance of modifications in the terms of the contract. If no nominations are received from any of the parties, the court shall appoint one or more service providers. Pursuant to noticed motion at any time and upon a showing of good cause, the court may order the removal of the service provider or vacate any agreement between the parties and the service provider, or both, effective as of the date of the order. The continued service of the service provider shall be subject to review periodically, as agreed by the parties and the service provider, or annually if they do not agree. Any disputes involving the contract or the duties, rights, and obligations of the parties or service providers may be determined on noticed motion in the action.

(6) Subject to these findings and the purpose of permitting and encouraging cost-effective and efficient discovery, "technology," as used in this section, includes, but is not limited to, telephone, e-mail, CD-ROM, Internet web sites, electronic documents, electronic document depositories, Internet depositions

and storage, video conferencing, and other electronic technology that may be used to improve communication and the discovery process.

(7) Nothing in this subdivision shall be construed to modify the requirement for use of a non stenographic court reporter as provided in paragraph (1) of subdivision (1) of Section 2025. The rules, standards, and guidelines adopted pursuant to this subdivision shall be consistent with the requirement of paragraph (1) of subdivision(1) of Section 2025 that deposition testimony be taken stenographically unless the parties agree or the court orders otherwise.

APPENDIX II

APPEARANCE AT DEPOSITION BY REMOTE ELECTRONIC MEANS

This proposed section would formalize remote appearance. Although this section deals with telephone appearance, remote video conferencing is sure to follow.

PROPOSED STATUTE

California Code of Civil Procedure section 2025 would be amended to add a new subdivision (h)(3):

§ 2025(h)(3)

(3) A person may take, and any person other than the deponent may attend, a deposition by telephone or other remote electronic means. The court may expressly provide that a nonparty deponent may appear at his or her deposition by telephone if it finds there is good cause and no prejudice to any party. A party deponent must appear at his or her deposition in person and be in the presence of the deposition officer. The procedures to implement this section shall be established by court order in the specific action proceeding or by the California Rules of Court.