Changes to California Code of Civil Procedure

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Several important changes to the California Code of Civil Procedure went into effect on Jan. 1. These amendments relate to the preparation of corporate witnesses for deposition, the protection of privileged communications, and the collection and production of electronically stored information. Prudent in-house counsel should be aware of these amendments in order to assure legal department best practices and to work effectively with outside counsel.

DEPOSITION TIME LIMIT

A new section of the Code of Civil Procedure, §2025.290, was enacted to limit the deposition of any person to seven hours of total testimony. The time limit includes examination by all counsel, except for the witness's own counsel. This provision brings California more in line with the Federal Rules of Civil Procedure, which likewise limits depositions to seven hours.

At first blush, this provision appears desirable for corporate witnesses, especially considering the busy schedule of most executives. However, there are a number of exceptions that take some of the bite out of this statute. For example, the seven-hour limit does not apply to the deposition of a person designated as a most qualified person (sometimes referred to as "Person Most Knowledgeable"), or to expert witnesses. It also does not apply to depositions in employment cases or in cases designated as complex, with limited exceptions. The parties may also do away with the time limit by stipulation. And finally, the court has the discretion to grant additional time.

The blanket exception for PMK witnesses from the seven-hour rule may encourage the noticing of more PMK depositions and fewer individual depositions. This could create headaches for in-house counsel tasked with determining the best corporate representative to testify on a wide range of topics that may have otherwise been sought from individual witnesses. With the likely increase in PMK depositions, it is as crucial as ever for in-house counsel to have a well-thought-out plan for identifying and educating witnesses to the fullest extent possible.

PRIVILEGE LOGS

It has long been common practice in California to provide a privilege log for documents that a party is withholding on the basis of privilege or other statutory protection. While many California courts have required such a privilege log pursuant

to case law, the Code of Civil Procedure has never expressly required one — until now. As amended, §2031.240 now provides that, in response to an objection on a claim of privilege or attorney work product, the party withholding documents must provide sufficient factual information for other parties to evaluate the merits of that claim, including if necessary, a privilege log.

There is little to no California case law explaining what constitutes "sufficient factual information for other parties to evaluate the merits" of an assertion of privilege. The recent amendment to §2031.240, however, suggests that a privilege log may suffice to establish the required factual showing. If courts read the amendment as such, the production of a clear and complete privilege log will reduce motion practice regarding documents withheld on the basis of privilege or work product protection.

The production of a privilege log is especially important when it comes to protecting the communications of in-house counsel. The attorney-client privilege clearly applies to corporations and their in-house counsel when the nature of the communication sought to be protected constitutes legal advice. As a practical matter, however, in-house counsel frequently wear more than one hat, providing both legal and business advice to their corporation clients. In recent years, California courts have paid increasingly close attention to the dual role of in-house lawyers when it comes to the application of the attorney-client privilege. Under revised §2031.240, the recognition of a privilege log as "sufficient factual information" from which to determine the proper application of privilege illustrates that it is critical for in-house counsel to prepare, or aid outside counsel in preparing, a privilege log that clearly indicates that the communications sought to be protected relate to legal advice. Such a privilege log will reduce the ability of opposing counsel to argue that in-house counsel was acting outside her legal capacity and to move to compel such communications.

DISCOVERY AND PRODUCTION OF ESI

The California Legislature amended several provisions of the Code of Civil Procedure to specifically address the discovery and production of ESI. These amendments recognize that more and more of today's business is conducted electronically, and the rules governing discovery of hard copy documents are insufficient to address the variety issues that may arise with regard to ESI.

Under the recent amendments, ESI is now among the things that a person can be bound by law to produce pursuant to a subpoena. Under prior law, a subpoena could require a person to produce any books, documents and other tangible things under the person's control. The inclusion of ESI expands the reach of a subpoena and may necessitate different means of production than would apply to books, documents or other objects. Such means of production could include giving an opposing party access to computers or databases that contain relevant ESI.

The amendments also provide procedures for objecting to the production of ESI if the form of the production would cause undue burden or expense, or the source of the information is not reasonably accessible. However, a court may order a party to produce ESI even if the source is not reasonably accessible, but has the discretion to allocate the expense of the production to the requesting party, if the court deems appropriate.

A court generally has the discretion to issue sanctions for the failure to comply with discovery requests. Under the new amendments, however, a court may not issue sanctions for the failure to produce electronically stored information that has been lost, damaged, altered or overwritten as the result of routine, good faith operation of an electronic information system. This limitation on the issuance of discovery sanctions makes it all the more important to have an effective data retention policy and other policies regarding electronically stored information in place prior to litigation.

Understanding these amendments to the California Code of Civil Procedure will ensure that in-house counsel are adequately equipped to (1) prepare corporate witnesses for depositions, (2) reduce or prevent motion practice relating to the protection of in-house counsel attorney-client communications, and (3) advise their corporate clients regarding internal ESI policies taking into account the expanded scope of litigation discovery under these amendments. Although it may ultimately be the responsibility of outside counsel to defend a deposition, draft a privilege log or produce ESI, in-house counsel should be familiar with the rules governing these activities to ensure effective and efficient collaboration with outside counsel.

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