# ESI: California

By David M. Hickey and Mark Smith

Each time a new e-discovery rule or decision is announced, the inquiry inevitably is what does it say about two threshold issues: data retention and data accessibility. These are the issues that lead ultimately to burden and production. The amendments concerning electronically stored information to California's Code of Civil Procedure are no exception. Looking at California's new rules, what do the changes mean to potential litigants who might find themselves in California state courts; and do California's new rules represent a genuine departure from the existing federal trends concerning electronically stored information or merely the next step in a progression toward universal accessibility and retention?

At one time, the practice was to evaluate document retention and accessibility as two distinct issues. Data that was too difficult or costly to retrieve and produce was deemed unduly burdensome. And retention policies were guided mostly by parties' non-litigation needs and compliance with a handful of regulatory policies that required retention of certain types of documents. At the outset, electronically stored information was particularly costly to collect, process, review and produce and a hassle to receive from an opponent. Just 10 years ago, sophisticated litigators like those at the U.S. The Justice Department and brand name firms on both sides of the bar wanted their documents to begin and end their lives in paper. Discovery of electronically stored information became important only once parties started to realize the vast wealth of relevant evidence they could find there.

The growth of importance of electronically stored information took off from there at the same time that the volume of it was rapidly expanding. Retention and accessibility of electronically stored information became increasingly difficult issues to address in litigation. They became so difficult that courts and parties started treating discovery of electronically stored information as a new problem that required new solutions.

### 'Zubulake': The New Sheriff in Town

A new regime for handling electronically stored information emerged six years ago when, in its series of seminal *Zubulake* decisions, a New Jersey district court introduced litigants and potential litigants to a bright line data accessibility test that had the effect of merging retention and accessibility issues. To its credit, the court attempted to make dealing with these issues easy by dividing the world of electronic data into five categories. Categories one through three, which could be called main-line data, were deemed accessible and had to be retained. Categories four and five, which consisted of deleted and fragmented data and something the court called "disaster recovery" data, were deemed inaccessible and did not need to be preserved except in special circumstances.

> There is a significant distinction between the federal and California rules: Under the California rules, all forms of electronically stored information are presumed to be accessible.

The consequence generally to litigants was that everything in categories one through three were deemed discoverable. And everything in categories four and five viewed as largely undiscoverable no matter how accessible the data truly were. Given that the court's five categories would inevitably lead to production of massive volumes of electronically stored information, the *Zubulake* court created a seven-factor test to address the issue of undue burden on the responding party. Further deviating from existing standards, the outcome of the test, if it favored the responding party, led to a cost-shifting arrangement rather than a determination that production of the documents was not required.

The *Zubulake* decisions further held that, for the data that is accessible, electronically stored information must be retained for potential future litigation under a reasonable document retention policy. Failure to do so would result in a finding of spoliation and sanctions. Electronically stored information-heavy potential litigants had no choice but to use the *Zubulake* categories as a roadmap for their retention policies, focusing their policies on only the "accessible" data categories, and re-naming their backup systems "disaster recovery systems" regardless of their actual accessibility so that their back-ups could be exempted from their retention policies and subsequent production in litigation.

In the meantime, six years of technological advances to electronic data systems made data ever more accessible and the *Zubulake* categories increasingly obsolete. Today, "disaster recovery" back-ups are in many cases nothing more than mirror server systems that can be and are being accessed regularly.

### The Federal Rules Get in the Game

In December 2006, amendments to the Federal Rules of Civil Procedure regarding electronic data opened the door for further change by picking up where *Zubulake* left off. Using broader language, the amendments reiterate the position in *Zubulake* that certain forms of electronically stored information are inaccessible. Under the federal amendments, "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible." The federal amendments also added a "safe harbor" provision similar to *Zubulake* that is designed to protect parties from spoliation motions if data was lost during the "routine, good faith operation of an electronic information system." The federal amendments added their own version of the *Zubulake* cost-shifting test but, unlike *Zubulake*, employed the factors as a means to "limit the frequency or extent of discovery."

The federal amendments, however, provided that for inaccessible electronically stored information the "court may nonetheless order discovery from such sources if the requesting party shows good cause." The consequence of this difference is that it expanded the responsibility of the responding party — in both scope and duration — to preserve information that, even though it may be deemed inaccessible, is still discoverable.

The Federal Rules are written broadly enough to accommodate the advances in technology that *Zubulake* did not, however the *Zubulake* decisions remain the law today. Federal courts continue to rely on them as the basis to resolve disputes over the production and retention of electronically stored information and continue to follow the bright-line categories and cost-shifting tests they set forth. And, though it is being done at potential litigants' peril, retention policies are still frequently guided by the *Zubulake* categories.

### California: Leading or Following?

Generally California's proposed e-discovery rules parallel the federal amendments. Both broadly define "electronically stored information." Both require the parties to meet and confer regarding discovery of electronically stored information — 21 days prior to a Rule 16(b) scheduling conference or order under the Federal Rules and 45 days prior to the case management conference regarding discovery in California state court. Both permit a requesting party to inspect, copy, test or sample electronically stored information, although the Federal Rules caution that courts should guard against undue intrusiveness that may result from providing direct access to a party's electronically stored information system. Both also provide parties with similar mechanisms for handling inadvertently produced documents. And both sets of rules are nearly identical with regard to the form of production, allowing the requesting party to specify a form and the responding party to object to the requested form.

There is, however, a significant distinction between the federal and California rules: Under the California rules, all forms of electronically stored information are presumed to be accessible. Asserting inaccessibility becomes the responding party's responsibility and in written discovery responses to avoid risk of waiver of the right to argue inaccessibility later.

These changes to California's e-discovery rules make *Zubulake's* formulaic approach to document accessibility — and thus the bright-line rules for retention — no longer applicable. Retention policies must be as broad as the scope of potential discovery. The presumption of accessibility in California brings with it the requirement to retain everything that might be discoverable, which is, simply put, everything. In order to avoid destroying evidence and be on the wrong end of a spoliation motion, California's rules require would-be litigants to preserve more than that required under *Zubulake* and the common practice under the Federal Rules.

The conflation of accessibility and retention and the trend toward total accessibility and retention that started with *Zubulake* and was continued with the amendments to the Federal Rules has progressed under California's new rules. While the future of accessibility and retention is not clear, what is clear is that potential litigants that might find themselves in California state courts and thus under California's new rules need to reevaluate their document retention policies in order to ensure that they are retaining their data consistent with California's broad position on accessibility. This doesn't mean that all electronically stored information must be retained indefinitely. It simply means that, in order to provide the best protection against spoliation motions, any forms of electronically stored information that might be responsive to future litigation should be deleted only pursuant to a reasonable retention policy unless a litigation hold is in effect.

**David M. Hickey** is a litigation partner and a vice chair of Winston & Strawn's e-discovery practice group and **Mark Smith** is a litigation associate in the firm's Los Angeles office.

DAILY JOURNAL SUPPLEMENT

NEWS
YOU CAN SINK YOUR TEETH *INTO*

WE INTERVIEW CALIFORNIA'S MUSEUM LAWYERS
In House
Our look at California's Corporate Counsel
AUGUST 12