Get Out the Check Book for Translating ESI into a Reasonably Usable Form in California

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California Code of Civil Procedure 2031.280(e) states, in relevant part:

If necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form.

California Code of Civil Procedure 2031.280(e) might give anyone used to litigation in Federal Court pause. The Federal Rules of Civil Procedure have no mention of "at the reasonable expense of the demanding party."

Reasonably Usable Form

The Advisory Committee Notes to Federal Rule of Civil Procedure Rule 26, and arguably CCP 2031.280(e), acknowledge that some electronically stored information as it is ordinarily maintained is not in a reasonably usable form, and thus requires translation into a form the requesting party can use. See, Michael R. Arkfeld, Arkfeld on Electronic Discovery and Evidence, §7.7(F), 7-207-208.

Federal Rule of Civil Procedure Rule 34(a)(1)(A) defines electronically stored information as "data compilations–stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form."

Magistrate Judge John Facciola explained Federal Rule of Civil Procedure Rule 34(a)(1)(A) in *D'Onofrio v. Sfx Sports Group, Inc.,* 247 F.R.D. 43, 47 (D.D.C. 2008):

In other words, electronic data is subject to discovery if it is stored in a directly obtainable medium. If, however, it is not stored in a directly obtainable medium, a request may be made of the responding party to translate the electronic data into a "reasonably usable form." Because the step of translating this type of electronic data adds an extra burden on the responding party, the request may only seek for it to be done "if [the translation is] necessary." It is not the case that this clause requires the responding party to produce data in its original form unless "necessary" to do otherwise.

Traditional Rule for Discovery Costs

The traditional rule is that parties pay for their own discovery productions. There are of course exceptions to this general rule. Federal Rule of Civil Procedure Rule 26(b)(2)(C) gives a Federal Court the inherent authority to shift discovery costs to the requesting party or proportionally between the parties. Additionally, Federal litigants may seek a protective order under Federal Rule of Civil Procedure Rule 26(c) if there is undue burden or cost. See, Arkfeld, §7.4(G), 7-77.

California & Cost Shifting

California provides a different, some might say clearer, others might say horrifying, solution when it comes to translating data compilations into a reasonably usable form and cost shifting: The law requires mandatory cost shifting. This requirement existed in the code prior to the Electronic Discovery Act and the major case addressing the issue is *Toshiba America Electronics Components v. Superior Court,* 124 Cal. App. 4th 762, 764 (Cal. App. 6th Dist. 2004).

In *Toshiba,* the parties fought over who would pay the cost to restore 800 back-up tapes spanning 8 years into a "reasonably useable form." The estimated cost was between $1.5 to $1.9 million. *Toshiba,* 765-766.

The Requesting Party argued cost-shifting would be unfair, citing to Federal law and ignoring then California Code of Civil Procedure section 2031(g)(1). *Toshiba,* 766.

The lower court ordered the Producing Party to "produce all nonprivileged e-mails from its backup tapes within 60 days." *Toshiba,* 767.

The Court of Appeals in *Toshiba* found that then California Code of Civil Procedure section 2031(g)(1) had mandatory language requiring cost-shifting. As the Court of Appeals explained:

By enacting the cost-shifting clause of section 2031(g)(1) our Legislature has identified the expense of translating data compilations into usable form as one that, in the public's interest, should be placed upon the demanding party. That is, section 2031(g)(1) is a legislatively determined exception to the general rule that the responding party should bear the cost of responding to discovery. When there is no dispute about the application of the statute, the statute automatically shifts the expense of translating a data compilation into usable form to the demanding party. The trial court's decision, which was based upon the general rule that the responding party bears that expense, was based upon a faulty legal analysis and was, therefore, an abuse of discretion. *Toshiba*, 772.

California has continued the requirement for mandatory cost shifting for data compilations into a reasonably usable form with California Code of Civil Procedure section 2031.280(e). While the provision does not have a built in mechanism to challenge the cost-shifting, a party can seek a protective order if there is undue expense or cost for translating the data into a reasonably usable form. *Toshiba*, 773.

So, if you are reqesting ESI that requires translation into a reasonably usable form, get the check book ready.