Study K-500 September 19, 1995

Memorandum 95-53

Discovery of Electronic Evidence: SB 1034

At its last meeting, the Commission expressed interest in studying the rules relating to discovery of electronic evidence. The staff observed that such discovery is the subject of SB 1034, a pending bill authored by Senator Calderon. As agreed at the meeting, this memorandum describes the status, scope, and politics of that bill.

STATUS OF SB 1034

SB 1034 passed the Senate by a 38-0 vote in May 1995. The bill went to the Assembly and was referred to the Committee on Judiciary. After author's amendments, the Committee on Judiciary was scheduled to hear the bill on July 12, 1995, but the hearing was canceled at the author's request and not rescheduled. Accordingly, SB 1034 is a two-year bill. A copy of the bill as last amended is attached as Exhibit pp. 1-12.

SCOPE OF SB 1034

The following discussion describes how SB 1034 would affect (1) the scope of discovery of electronic evidence, (2) the form of producing electronic evidence, (3) allocation of the expense of producing electronic evidence, (4) preservation of electronic data while litigation is pending, (5) sanctions for failure to produce electronic evidence, and (6) the consequences of producing electronic evidence.

(1) Scope of discovery of electronic evidence

SB 1034 is intended to facilitate discovery of electronic evidence. The bill includes a legislative finding that "information which is stored, used, or transmitted in new forms, including computer data, should be available through discovery with the same openness as traditional forms." The bill would give meat to this finding through specific rules regarding the form of producing computer data and other data compilations.

(2) Form of producing electronic evidence

Code of Civil Procedure Section 2031 currently provides that a party responding to a document request shall "through detection devices, translate any data compilations included in the demand into reasonably usable form." SB 1034 would expand on that requirement. The current amended version would specify that if the data could be translated into more than one reasonably usable form, "the responding party may translate the data into any reasonably usable form." Further, the bill now says that if the party promulgating the document request demonstrates that additional information or material is necessary to make data compilations reasonably usable, the party responding to the request "shall produce the information and material which is necessary in order for the data compilations to be intelligible and reasonably usable." Such information could include, but would not be limited to:

> (A) Material relating to the record holder's computer hardware.
>
> (B) Custom or proprietary software programs.
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> (C) The computer programming techniques employed in connection with the relevant data.
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> (D) The principles governing the structure of the stored data.
>
> (E) The operation of the data processing system.
>
> (F) The underlying data used to compose statistical analyses.
>
> (G) The methods used to select, categorize, and evaluate the data.
>
> (H) All of the computer outputs.

With respect to these points, earlier versions of SB 1034 are similar to the current amended version, although not identical.

(3) Allocation of the expense of producing electronic evidence

Allocation of the expense associated with discovery of electronic evidence appears to be by far the most controversial aspect of SB 1034. Under existing law, when it is necessary to translate data compilations into reasonably usable form, that step shall be "at the reasonable expense of the demanding party." *See* Code Civ. Proc. § 2031(f)(1).

The 4/27/95 version of SB 1034 would have deleted that requirement, on the theory that the responding party normally bears the expense of document discovery and the rule should be the same in the context of discovery of computer evidence. That is the federal approach. As reported in the Senate analysis of SB 1034, however, the California Defense Council, which was "otherwise supportive of the concept" of SB 1034, was concerned about requiring responding parties to bear the expense of translating data compilations, because arguably that could "encourage overly burdensome discovery requests."

Presumably due to such concern, the 5/9/95 version of SB 1034, unlike the 4/27/95 version, would "authorize the court to allocate between the parties the cost of translation and providing information necessary to understand the data compilations …." That is the version of the bill that the Senate passed.

Later, however, the allocation of expenses was changed yet again: The 7/7/95 version of SB 1034, which is the current amended version, would keep the existing requirement that translation of data compilations be "at the reasonable expense of the demanding party." Unlike existing law, however, the 7/7/95 version would expressly state that to avoid abuse of the statutory requirements regarding production of data compilations, "a court may, upon motion of a party, allocate between the parties the expense of translating data compilations, of producing information necessary to understand and utilize data compilations, and of preserving data compilations, as justice requires." The 7/7/95 would also add a legislative finding that "plaintiffs and defendants, demanding parties and responding parties, all bear an equal obligation to ensure the responsible use of the discovery process by engaging in good-faith efforts to employ the most efficient means of producing, and utilizing, computer-stored information." Like all prior versions of SB 1034, the 7/7/95 version includes a general finding that "the provisions of this act are declarative of existing law."

Apparently, the 7/7/95 version has not ended the debate about expense allocation. The Assembly analysis of SB 1034, which was prepared after the 7/7/95 amendment, reports that Personal Insurance Federation of California (PIFC) opposes SB 1034 unless amended. Specifically, PIFC reportedly "believes that the language of the bill requiring that information necessary to utilize the data compilations be disclosed, … could be interpreted to require the responding party to assume the costs of expensive conversions of its computer programming system."

(4) Preservation of electronic data during pendency of litigation

SB 1034 says almost nothing about preservation of electronic data during the pendency of litigation. Only the 7/7/95 version of the bill mentions the topic at all, and even that version only authorizes courts "upon motion of a party" to "allocate between the parties the expense of … preserving data compilations, as justice requires."

(5) Sanctions for failure to produce electronic evidence

Neither the current nor any prior version of SB 1034 addresses the topic of sanctions for failure to produce properly requested electronic evidence. Code of Civil Procedure Section 2023 already governs the availability of sanctions for discovery abuse in general.

(6) Consequences of producing electronic evidence

Under the version of SB 1034 that the Senate passed (the 5/9/95 version), to the extent that proprietary information is ordered produced pursuant to the statutory requirements for translating data compilations, "the court shall do so through the issuance of a strict protective order restricting the use of this information exclusively to the subject matter of the litigation that is the basis of the order." The current amended version of SB 1034 (the 7/7/95 version) would expand the court's duty in that regard to include entry of "any other appropriate order, as justice requires." Aside from these commands, SB 1034 does not seem to address the consequences of producing electronic evidence.

POLITICS OF SB 1034

According to the committee analyses of SB 1034, supporters of SB 1034 include JAMS Endispute, Professor James Hogan (University of California, Davis), the Litigation Section of the State Bar, and the Law Offices of Slovak and Baron.

As for opposition, the Assembly analysis mentions PIFC's opposition to the expense allocation in the current amended version of the bill. Additionally, PIFC reportedly contends that a paper printout of the data should be allowed "in lieu of the items enumerated in the bill." The staff does not know whether PIFC's concerns have been resolved by now, nor whether any new opposition has surfaced since preparation of the Assembly analysis.

The author's office reports that they fully expect to move the bill during 1996.

CONCLUSION

SB 1034 touches on many aspects of discovery of electronic evidence, but its future is unclear and there are areas it does not fully cover. In assessing how to proceed with respect to discovery of electronic evidence, the Commission may find it helpful to know more about the politics of SB 1034 and the approaches that other states and legal commentators have taken with regard to the discovery of electronic evidence. The staff could look into these points for the next meeting if the Commission is interested.

Clearly, SB 1034 has raised extensive debate regarding allocation of the expense of producing electronic evidence. The staff believes that the Commission should await the outcome of the debate on SB 1034 before deciding whether to gent involved in this matter.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel