

■ Introduction/Summary of Update

The biggest impact on California's discovery rules last year came from the legislature with the passage of the California Electronic Discovery Act (the "Act"). The Act, which Governor Arnold Schwarzenegger signed into law on June 29, 2009, models the Federal E-Discovery Rules and creates new rules governing electronically stored information.

In 2009, the California Supreme Court ruled that a written attorney-client privileged communication that also contains unprivileged information is entirely protected from disclosure and an *in camera* disclosure of the information is not required.

The appellate courts also issued a number of decisions in 2009 that affected the discovery rules in California. The First District Court of Appeal issued sanctions against a party for making meritless objections and providing evasive responses. The Second District Court of Appeal held that a court must weigh the potential for abuse of the class action procedure against the rights of the parties when a named class action plaintiff who never had standing seeks pre-certification discovery to identify a substitute class representative. Finally, the Fifth District Court of Appeal recently held that witness statements taken by an attorney or an attorney's representative are not privileged under the attorney work-product privilege.

■ New California E-Discovery Rules

The California Electronic Discovery Act (the "Act"), which became effective June 29, 2009, was modeled after the Federal E-Discovery Rules that were enacted in 2006. The Act creates new rules to specifically address issues related

to electronically stored information ("ESI"), defined as information stored by a medium relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.¹ The Act includes provisions for responding to production demands for ESI, the form of production, protection against the imposition of sanctions for the loss of certain information in specific circumstances, and protection for non-parties in situations in which subpoenas seeking ESI would cause an undue burden and/or expense.

Responding to Production Demands for ESI

The Act does not change how a party must respond to discovery, it simply adds ESI to the categories of materials that must be produced.² The Act does, however, contain specific provisions on how to object to requests for ESI. A responding party who objects to a discovery request on the ground that the ESI is not reasonably accessible due to undue burden or expense must specifically identify the types or categories of ESI that it claims are not reasonably accessible.³ Unlike other discovery objections, however, the burden is on the responding party to demonstrate that a search for and production of ESI would be unduly burdensome or costly.⁴

Form of Production

The propounding party may specify the format of the ESI being requested.⁵ If the requesting party fails to specify the format, the responding party may choose the format. Regardless, the responding party must provide the ESI in the manner in which it is ordinarily kept or in another reasonably accessible format.⁶ Once the

1. C.C.P. §§2016.020(d) and (e).

2. C.C.P. §2031.010 *et seq.*

3. C.C.P. §2031.210(d).

4. C.C.P. §2031.310(d).

5. C.C.P. §2031.030(a)(2).

ESI is produced in one format, the responding party need not produce the same information again in another format.⁷

Protection Against Imposition of Sanctions For Failing To Produce ESI

The Act provides responding parties with greater protection than the Federal Rules in situations in which ESI cannot be produced. Under the Act, sanctions may not be imposed against a party or an attorney for the failure to produce ESI that has been “lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.”⁸

Protection of Non-Parties in Connection with Subpoenas for ESI

The new rules for obtaining ESI from non-parties are essentially the same as those for obtaining ESI from parties to the action, except for two additional provisions that impose mandatory protections for non-parties.⁹ The first provision, added to §1985.8, requires that a party seeking ESI from a non-party “take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”¹⁰ The second new provision provides for court orders to protect nonparties from undue burden or expense that would result from compliance with an ESI discovery request.¹¹

■ Written Attorney-Client Privileged Communication Containing Unprivileged Information Is Protected In Its Entirety and Parties Are Not Required to Make An In Camera Disclosure Of The Material For A Ruling On A Claim Of Attorney-Client Privilege

Last year, the California Supreme Court considered “whether the trial court erred by directing a referee to conduct an in camera review of an opinion letter sent by outside counsel to a corporate client, allowing the referee to redact the letter to conceal that portion the referee believed to be privileged, and ordering the client to disclose the remainder to the opposing party.”¹² The Supreme Court found that the trial court’s order violated the attorney-client privilege and violated the statutory prohibition against requiring disclosure of information claimed to be subject to the attorney-client privilege in order to rule on a claim of privilege.¹³

In June 2000, Costco hired an attorney to provide legal advice regarding whether certain managers were exempt from California’s wage and overtime laws. The attorney provided a 22-page opinion letter to Costco.¹⁴ Several years later, Costco’s employees filed a class action lawsuit claiming that Costco misclassified its managers as exempt employees and therefore failed to pay them overtime wages that they were entitled to.¹⁵ Plaintiffs sought to compel discovery of the opinion letter. Costco objected on the grounds that the letter was protected by the attorney-client and attorney work product privileges.¹⁶ Plaintiffs disagreed, claiming that the letter contained unprivileged matter and that Costco put the contents of the letter at issue and therefore waived the privilege.¹⁷ The trial court ordered a discovery referee to conduct an in camera review to determine whether the privilege applied. The referee concluded that although much of the letter constituted attorney-client communication and attorney work product, the portions containing

6. C.C.P. §2031.280(d)(1).

7. C.C.P. §2031.280(d)(2).

8. C.C.P. §§2031.060(i)(1) and 2031.300(d)(1).

9. See C.C.P. §§1985.8(j) and (k).

10. C.C.P. §1985.8(j).

11. CCP §1985.8(k).

12. *Costco Wholesale Corp. v. Sup. Ct.*, 47 Cal. 4th 725, 730 (2009).

13. *Id.*

14. *Id.*

15. *Id.* at 730-31.

16. *Id.* at 731.

17. *Id.*

factual information regarding the employees' job responsibilities should be provided since they were not protected by either privilege. The referee ordered Costco to produce a redacted version of the letter.¹⁸ Costco petitioned for a writ of mandate, which was denied by the appellate court on the grounds that Costco did not demonstrate that disclosure would cause it irreparable harm.¹⁹

The California Supreme Court reversed. The California Supreme Court concluded that the attorney-client privilege protects the opinion letter in its entirety, irrespective of the content, and that Evidence Code §915 prohibits disclosure of the information claimed to be privileged pending a ruling on a claim of privilege.²⁰ “[W]hen the communication is a confidential one between attorney and client, the entire communication, including its recitation or summary of factual material, is privileged.”²¹ If there is factual material referred to or summarized in the privileged document that is itself unprivileged, “it may be discoverable by some other means, but plaintiffs may not obtain it by compelling disclosure of the letter.”²²

Furthermore, under Evidence Code §915, “the presiding officer may not require disclosure of information claimed to be privileged under this division...in order to rule on the claim of privilege.”²³ Although *in camera* review may be required of information protected by the work product privilege, nothing permits *in camera* review of information claimed to be protected by the attorney-client privilege. The court pointed out that a court could require disclosure of other information to permit the

court to evaluate the basis of the claim, but the court may not require disclosure of the information claimed to be privileged itself.²⁴ Only after a court determines that the privilege has been waived or some exception applies, may it then order an *in camera* review to determine whether some protection is warranted.²⁵

Finally, the Supreme Court held that a party seeking extraordinary relief from a discovery order that the party contends wrongfully invades the attorney-client privilege need not establish that the case will be harmed by disclosure of the evidence.²⁶ “[T]he primary harm in the discovery of privileged material is the disruption of that relationship, not the risk that parties seeking discovery may obtain information to which they are not entitled.”²⁷

■ Court Sanctions Party For Providing Evasive Responses And Unjustified Objections To Interrogatories

The situation at issue in *Clement v. Alegre*, 177 Cal. App. 4th 1277 (2009), highlights “the lengths to which some counsel and clients will go to avoid providing discovery (in this case by responding to straightforward interrogatories with nitpicking and meritless objections), resulting in delaying proceedings, impeding the self-executing operation of discovery, and wasting the time of the court, the discovery referee, the opposing party, and his counsel.”²⁸

In *Clement*, plaintiffs sued for damages and specific performance in connection with a dispute involving real property.²⁹ Defendant served 23 special interrogatories requesting information on damages, causation and the existence of a loan commitment.³⁰ Plaintiffs objected to

18. *Id.*

19. *Id.*

20. *Id.* at 731-32.

21. *Id.* at 736.

22. *Id.*

23. *Id.*

24. *Id.* at 737.

25. *Id.* at 740.

26. *Id.* at 732.

27. *Id.* at 741 (internal citations omitted).

28. *Id.* at 1281.

29. *Id.* at 1281-82.

30. *Id.* at 1282.

all the interrogatories except three. In response to interrogatories asking for a description of economic damages, plaintiffs objected on the ground that the interrogatories were “vague and ambiguous” because defendant did not specifically refer to Civil Code §1431.2, which defines “economic damages.” With respect to the interrogatories that asked for a statement of the amount of damages identified in the previous interrogatory, plaintiffs objected on the ground that the interrogatory violated C.C.P. §2030.060(d) because it was not full and complete in itself since it referenced an answer to a previous interrogatory. After meeting and conferring, the defendant moved to compel further responses and sought sanctions.³¹

A discovery referee heard the matter and found that with respect to plaintiffs’ objections that the phrase “economic damages” was vague and ambiguous, they had “‘deliberately misconstrued the question.’”³² With respect to plaintiffs’ claim that the interrogatories that referenced prior interrogatories was not full and complete in itself, the discovery referee found “‘the objections and each of them to be unreasonable, evasive, lacking in legal merit and without justification.’”³³ The referee recommended that plaintiffs be ordered to provide further answers without objections and that sanctions be imposed against plaintiffs. The trial court agreed, adopted the referee’s order, and an appeal followed.

On appeal, the First District Court of Appeal determined that plaintiffs’ contention that the term “economic damages” was vague and ambiguous was “preposterous in the circumstances presented.”³⁴ The court found

ample evidence to support the discovery referee’s determination that plaintiffs “‘deliberately misconstrued the question[,]’” as they themselves quoted the statute defining the term.³⁵ “Clearly this was ‘game playing’ and supports the referee’s findings and the sanctions award.”³⁶ Although the court determined that plaintiffs were trying to be evasive, the court concluded that even if the plaintiffs were not trying to be evasive, plaintiffs’ intent was not relevant. “‘There is no requirement that misuse of the discovery process must be willful for a monetary sanction to be imposed.’”³⁷ The court decided that sanctions were warranted because plaintiffs’ objection was without substantial justification and their responses were evasive.³⁸

As to plaintiffs’ objection that the interrogatories were not “full and complete in and of itself,” the court affirmed the discovery referee’s determination that plaintiffs were pursuing a dispute that was not “genuine.”³⁹ Although C.C.P. §2030.060(d) requires each interrogatory to be full and complete in and of itself, nothing in the legislative history of C.C.P. §2030.060(d) or its predecessor provides clarification regarding the “full and complete in and of itself” language.⁴⁰ Instead, the focus of the legislative history and the statute itself is the prohibition of prefaces, instructions, definitions and subparts that might be used to evade the 35 question limit for interrogatories.⁴¹ Thus, the court determined that “reference to other materials or documents or incorporation by reference of such materials is prohibited where the effect is to undermine the rule of 35.”⁴² In this case, the reference to another interrogatory did not have the effect of undermining the rule of 35,⁴³ rather, “the purpose of plaintiffs’ objections

31. *Id.* at 1284.

32. *Id.*

33. *Id.* (internal citations omitted).

34. *Id.*

35. *Id.* at 1286.

36. *Id.*

37. *Id.* at 1286 (internal citations omitted).

38. *Id.* at 1287.

39. *Id.* at 1292.

40. *Id.* at 1289.

41. See *Id.* at 1288-89.

42. *Id.* at 1290.

was to delay discovery, to require defendants to incur potentially significant costs in redrafting interrogatories that were clear and that did not exceed numerical limits, and to generally obstruct the self-executing process of discovery.”⁴⁴ The court also determined that defendant met his duty to meet and confer, despite “never compromis[ing] his position” that the interrogatories were proper and refusing to be bullied into rewriting his interrogatories.⁴⁵

■ Court Must Weigh Potential For Abuse Of The Class Action Procedure Against The Rights Of The Parties When A Named Class Action Plaintiff Who Never Had Standing Seeks Precertification Discovery To Identify A Substitute Class Representative

In *Safeco Ins. Co. of America v. Sup. Ct.*, 173 Cal. App. 4th 814 (2009), the Second District Court of Appeal addressed the issue of precertification discovery and whether a plaintiff who did not have standing to sue is allowed to conduct precertification discovery for the purposes of finding a substitute class representative. Explaining the two different conclusions in the cases of *Cash Call, Inc. v. Sup. Ct.*, 159 Cal. App. 4th 273 (2008) and *First American Title Ins. Co. v. Sup. Ct.*, 146 Cal. App. 4th 1564 (2007), while relying on *Parris v. Sup. Ct.*, 109 Cal. App. 4th 285 (2003), the court determined that “[a] trial court ruling on a motion for precertification discovery to identify potential class members must ‘expressly identify any potential abuses of the class action procedure that may be created if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances.’”⁴⁶

In *Safeco*, plaintiff filed a representative action against Safeco and First National, alleging that defendants charged consumers more for auto insurance if they did not previously have insurance or if they had a gap in coverage, in violation of California’s Insurance Code and the Unfair Competition Law (“UCL”).⁴⁷ Three years later, after passage of Proposition 64,⁴⁸ defendants filed a motion for judgment on the pleadings on the grounds that plaintiff did not have standing. The trial court granted the motion with leave to amend.⁴⁹

Plaintiff’s counsel amended the complaint to add a new class representative.⁵⁰ Defendants filed a motion for summary judgment, arguing that the new plaintiff did not have standing because defendants did not consider her lack of prior insurance or continuous coverage as a factor in charging her for auto insurance, except for purposes of determining whether a persistency discount applied. Apparently, the new plaintiff had a number of lapses in coverage due to non-payment of premiums.⁵¹ Plaintiff opposed the motion, claiming that even though she was not charged more for insurance like other class members, she still suffered an injury-in-fact because defendants refused to sell her a policy, which meant that she had to purchase another policy for more money. She argued in the alternative that if the court found that she did not have standing to sue defendants, she should be permitted to conduct discovery to identify a new class representative.⁵²

The trial court granted the motion for summary judgment, but said it would not enter an order until considering plaintiff’s request for precertification discovery, which it instructed

43. *Id.*

44. *Id.* at 1292.

45. *Id.* at 1294.

46. *Safeco*, 173 Cal. App. 4th at 832.

47. *Id.* at 818.

48. Proposition 64 restricted a private person’s standing to sue under the UCL by requiring plaintiffs bringing an action under the UCL to have “suffered injury in fact” and “lost money or property as a result of the unfair competition.”

49. *Id.* at 819.

50. *Id.* at 822.

51. *Id.*

52. *Id.* at 823.

plaintiff to do by noticed motion.⁵³ Accordingly, relying on *Cash Call*, plaintiff filed a motion for precertification discovery for the purpose of identifying a class member who could serve as a class representative.⁵⁴ Even though the trial court recognized that plaintiff was not a member of the putative class, the trial court weighed the potential for abuse of the class action procedure against the rights of the putative class members and ultimately granted the motion. The trial court found that without the requested discovery, it would be impossible for an insured to know whether an overcharge was caused by a lapse in coverage, the statute of limitations would likely bar many class members' claims and there was no other action that might otherwise provide the putative class members relief.⁵⁵ In addition, plaintiff had made a strong offer of proof, including direct evidence that defendants were surcharging in violation of law, and, therefore, the trial court concluded that the rights of the putative class members outweighed the potential for further abuse and granted the motion for precertification discovery.⁵⁶

Defendants filed a petition for writ of mandate.⁵⁷ Relying on *First American*, defendants argued that a plaintiff who is not and was never a member of the class cannot be allowed to conduct precertification discovery.⁵⁸ The Second District Court of Appeal disagreed. Relying on *Parris*, the court held that "a trial court ruling on a motion for precertification discovery to identify potential class members must 'expressly identify any potential abuses of the class action procedure that may be created

if the discovery is permitted, and weigh the danger of such abuses against the rights of the parties under the circumstances.'"⁵⁹ The Court held that *First American* does not stand for the proposition that a plaintiff who was never a class member in a UCL action is never entitled to conduct precertification discovery. Instead, the court found that even though the potential for abuse may be great in those circumstances, the potential for abuse must nevertheless be weighed against the rights of the parties.⁶⁰ The court also held that *Cash Call* does not stand for a bright line rule that allows for precertification discovery in any situation in which a plaintiff never had standing. A weighing test must still be performed.⁶¹ Thus, it was apparent in *First American* that "there was no indication that class members would be denied relief if the class action did not proceed on their behalf."⁶² In contrast, in *Cash Call*, it was likely that class members would be denied relief without precertification discovery.⁶³ But, an "absence of a reasonable, good faith belief that the plaintiff had standing under the law in effect at the time the plaintiff was first named as a plaintiff ordinarily should compel the denial of a motion for precertification discovery. The potential for abuse of the class action procedure in those circumstances is overwhelming."⁶⁴

In the case before it, the Second District agreed with the trial court's determination that the rights of putative class members outweighed the potential for abuse.⁶⁵ The court also concluded that plaintiff's counsel did have a reasonable, good faith belief that plaintiff had standing when she was first named as a plaintiff.⁶⁶

53. *Id.*

54. *Id.* at 824.

55. *Id.* at 824-25.

56. *Id.* at 825.

57. *Id.*

58. *Id.* at 826.

59. *Id.* at 832 (internal citations omitted).

60. *Id.* at 833.

61. *Id.*

62. *Id.* at 830.

63. *Id.* at 832.

64. *Id.* at 833.

65. *Id.* at 834.

■ Witness Statements Taken By Attorney or Attorney’s Representatives Are Not Protected By The Attorney Work-Product Privilege

The Fifth District Court of Appeal recently considered whether a witness statement taken by an attorney is privileged as attorney work product and held that such statements are not protected.⁶⁷

Coito was a wrongful death action, filed after a 13-year-old drowned in a river. The boy’s mother sued the State of California and a number of other defendants.⁶⁸ At the time of the drowning, six other juveniles were present and witnessed the incident. Attorneys for the state sent two investigators with a list of questions to interview and take recorded statements from four of the juveniles who had been present at the scene of the drowning.⁶⁹ The witness statements were saved on a CD, and the investigators created a memo summarizing the interview for the attorneys.⁷⁰ Counsel for the state used one of the witness statements made during these interviews while questioning one of the witnesses at deposition. Plaintiff served the state with interrogatories and requests for production of documents, including form interrogatory 12.3, which sought the names and contact information of witnesses from whom written or recorded statements were taken, as well as the actual recorded statements. The state objected on the ground that the requests implicated information protected by the attorney work product privilege. After meeting and conferring, plaintiff filed a motion to compel, and included the declarations of two of the witnesses who said that they did not intend their

recorded statements to be confidential.⁷¹

The trial court denied plaintiff’s motion to compel on the ground that the list of potential witnesses and their recorded statements were entitled to absolute work-product protection.⁷² The trial court, however, did compel production of the one witness statement that was used in examining the witness at deposition.⁷³ Plaintiff filed a petition for writ of mandate, which the Fifth District Court of Appeal ultimately granted.⁷⁴

The attorney work-product privilege, which is codified under C.C.P. §2018.030, is divided into two categories—absolute and qualified. Absolute protection from discovery consists of any “writing that reflects an attorney’s impressions, conclusions, opinions, or legal research or theories...” like a “memorandum written by an attorney, after taking a statement from a potential witness, summarizing the attorney’s impressions and conclusions.”⁷⁵ Writings covered under the absolute protection are not discoverable under any circumstances. A writing covered under the qualified protection category—a catch all for everything else—“is not discoverable unless the court determines that the denial of discovery will unfairly prejudice the party seeking discovery in preparing that party’s claim or defense.”⁷⁶ Although qualified work product is not statutorily defined, courts have held that the protection only applies to “derivative” material, “which is material ‘*created by or derived from* an attorney’s work on behalf of a client that reflects the attorney’s *evaluation or interpretation* of the law or the facts involved.’”⁷⁷ Courts have held “nonderivative” material, which is “only *evidentiary* in character” is “not pro-

66. *Id.* at 834.

67. *See Coito v. Sup. Ct.*, 182 Cal. App. 4th 758, 761 (2010).

68. *Id.*

69. *Id.* at 761-62.

70. *Id.* at 762.

71. *Id.*

72. *Id.* at 762-63.

73. *Id.* at 763.

74. *Id.*

75. *Id.* at 763-64 (quoting §2018.030(a)).

76. *Id.* at 764(citing §2018.030(b)).

77. *Id.* (internal citations omitted) (emphasis in original).

tected even if a lot of attorney ‘work’ may have gone into locating and identifying [it].”⁷⁸ “A guiding principle in this analysis is that ‘[i]nformation regarding events provable at trial, or the identity and location of physical evidence, cannot be brought within the work product privilege simply by transmitting it to the attorney.’”⁷⁹

The Court of Appeal held that “written and recorded witness statements, including not only those produced by the witness and turned over to counsel but also those taken by counsel,” are not protected by the absolute attorney work product privilege.⁸⁰ The court reasoned that “witness statements are classic evidentiary material. They can be admitted at trial as prior inconsistent statements, prior consistent statements, or past recollection recorded. Yet, if the statements are not subject to discovery, the party denied access to them will have had no opportunity to prepare for their use....These impacts on the quest for truth simply are not justified by the policy of encouraging lawyers to prepare their cases for trial or the policy of protecting the diligent attorney from others who would take advantage of his or her industry.”⁸¹ Further, because the witness statements are not protected, neither is a list of witnesses from whom such statements have been taken.⁸²

The court also rejected the state’s argument that the witness statements are protected by the qualified privilege. The court found that even though “an attorney could reveal his or her thoughts about a case by the way in which the attorney conducts a witness interview... competent counsel will be able to tailor their interviews so as to avoid the problem should they choose to do so.”⁸³ Moreover, if a witness interview did reveal interpretive rather than evidentiary information, the attorney could

request an in camera hearing before the trial court to convince the court that the interview or some portion of it should be protected as qualified work product.⁸⁴

78. *Id.* (internal citations omitted) (emphasis in original).

79. *Id.* (internal citations omitted).

80. *Id.* at 769.

81. *Id.* at 768-69 (internal citations omitted).

82. *Id.* at 769.

83. *Id.*

84. *Id.* at 770.