



# The Marin Lawyer

An Official Publication of the Marin County Bar Association



## JUSTICE MORENO TO SPEAK AT MARIN COUNTY BAR ASSOCIATION GENERAL MEETING ON "DIVERSITY AND THE ART OF DISSENTING."

The MCBA is thrilled to announce that California Supreme Court Justice Carlos R. Moreno will speak at the **August 26** general membership meeting, to be held at the Four Points Sheraton Restaurant in San Rafael.

The topic will be "Diversity and the Art of Dissenting." Justice Moreno will take questions at the end of the presentation (subject, of course, to ethical limitations).

Justice Moreno, who earned a B.A. from Yale and a J.D. from Stanford Law School, has been on the California Supreme Court since 2001. Before that, he served as a federal district court judge for the Central District of California, and a judge of the municipal and superior courts in Los Angeles. As an attorney, he worked for the Los Angeles City Attorney's office and in private practice.

He was the lone dissenter in *Strauss v. Horton*, the recent state supreme court decision upholding Proposition 8, which banned same-sex marriages in California. According to press reports, he was on President Obama's short list for an appointment to the United States Supreme Court to replace retiring justice David Souter.

*(Continued on page 10.)*

## Calendar of Events

**Aug 26<sup>th</sup>**  
General Membership Meeting  
12 – 1:30 pm

**Aug 19<sup>th</sup>**  
Probate & Estate Planning Section Meeting  
12 – 1:30 pm

**Aug 20<sup>th</sup>**  
Real Property Section Meeting  
12 – 1:30 pm

**Aug 24<sup>th</sup>**  
Probate & Trusts Mentor Group  
12 – 1:30 pm

Look for details each month in *The Marin Lawyer*

## In This Issue

- President's Message..... 2
- Lead-Free Plumbing..... 3
- Ashcroft V. Iqbal*..... 4
- Going Green..... 5
- California Electronic Discovery Act..... 6
- National Black Prosecutors Assoc. .... 7
- Spotlight on Derek Weller..... 8
- Green Star Incentive Program..... 10
- Application for Officer or Director..... 15
- Legal Self Help Move..... 17
- Details for Calendar..... 17
- New Members/ Change of Scene..... 18
- The Marketplace ..... 19

Jordan A. Lavinsky was Guest Editor of this issue of *The Marin Lawyer*. Philip R. Diamond is Series Editor for 2009.

## STIPULATIONS FOR ENTRY OF JUDGMENT: PLAINTIFFS BEWARE

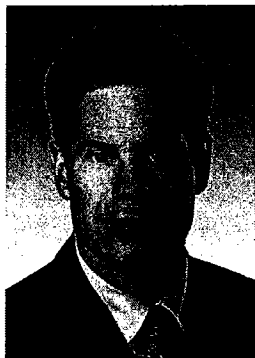
*By Jordan A. Lavinsky*

Stipulations for entry of judgment, pursuant to which a judgment will be entered for a larger amount if the defendant fails to timely pay a lesser agreed upon amount, are commonly used to facilitate settlement. This seemingly effective tool is not, however, without risk as illustrated by the recent decision in *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4<sup>th</sup> 49. Consider the following scenario:

Tenant enters into a retail lease with a 10-year term and then fails to pay rent for the last two months



*(Continued on page 11.)*



Mert Howard

## THE CALIFORNIA ELECTRONIC DISCOVERY ACT

By Mert Howard and Batya Swenson

The California Electronic Discovery Act (Assembly Bill 5) was signed into law by Governor Schwarzenegger on June 29, 2009. Effective immediately, it amends various provisions of the Code of Civil Procedure related to

the discovery of electronically stored information ("ESI"). The Act is intended to clarify existing ambiguities in the procedures as they relate to ESI in state court practice, much in the way that the changes to the Federal Rules of Civil Procedure did in federal court practice a few years ago. A few of the most significant changes are discussed here. The changes to the Code have been inserted throughout the Civil Discovery Act (Cal. Code Civ. Proc. §§ 2016.020, 2031.010, et seq., and 1985.8) and are referred to here by section number only.

**Scope:** A party may now "inspect, copy, test, or sample" ESI in the "possession, custody, or control of the party on whom demand is made." (Section 2031.010 (e).) The Act provides new language clarifying that a party requesting ESI in a demand for production may specify the form in which that ESI should be produced. (Section 2031.030 (a)(2).)

**Responding to a Request for ESI:** If the requests do not so specify, the responding party may produce the information in the form in which it is ordinarily maintained or in a form that is reasonably usable. (Section 2031.280 (d)(1).) If necessary, the responding party must, "through detection devices, translate any data compilations included in the demand into reasonably usable form." (Section 2031.280 (e).) However, the Act allows the responding party to charge the costs associated with that data processing back to the requesting party. (*Id.*)

In order to preserve its objections to requests for ESI, the responding party's written responses must identify the types or categories of sources of ESI that it asserts are not reasonably accessible. (Section 2031.210 (d).) The statutes do not establish, however, which of the two possible next steps for an objecting party is favored (*i.e.*, waiting for and opposing a motion to compel or bringing a motion for protective order). Thus, the next move remains a strategic decision for counsel. (Sections 2031.060 & 2031.310.)

In either case, the objecting party bears the burden of proving that the ESI is not "reasonably accessible", which is now the standard. (Sections 2031.060 (c) & 2031.310 (d).) Therefore, counsel must be familiar enough with the

client's ESI and the people who manage it to adequately explain and assemble the evidence demonstrating why the ESI is not reasonably accessible in the context of a particular matter.

The term "reasonably accessible", although not itself defined, is tied to the concept of "undue burden or expense." (Sections 2031.060 (c) & 2031.310 (d).) Both are relative concepts that the courts will evaluate by balancing a number of familiar factors. These are the same factors, in fact, that the courts will use to assess whether limits should be imposed on discovery of ESI that is otherwise reasonably accessible. Relevant factors include: (1) whether the information can be obtained from a less expensive, more convenient source; (2) whether the demand is unreasonably cumulative or duplicative; (3) whether the demanding party has had ample opportunity to obtain the information through discovery; and (4) whether "the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues." (Sections 2031.060 (f) & 2031.310 (g).)



Batya Swenson

(Continued on page 14)

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(California ED Act, continued from page 6.)

Even so, notwithstanding a finding that ESI is not reasonably accessible, the court may order that ESI be produced but then reallocate the associated costs to the requesting party. (Sections 2031.060 (e) & 2031.310 (f).) This should give the requesting party incentive to exercise some restraint in those requests it chooses to compel. And, as always, the court may sanction the losing party if it finds that party's position in a discovery motion was not substantially justified under the circumstances.

**Meet and Confer Requirements:** Another important point concerns the timing and scope of the lawyer's duty to meet and confer about ESI. Here, the Act falls short of expressly imposing a preliminary meet and confer requirement comparable to the ESI conference required under Federal Rule of Civil Procedure Rule 26(f). However, counsel is still required to meet and confer in good faith prior to bringing any discovery motion. From a practical perspective, most parties will find that they must meet and confer early and often about the types of ESI at issue and the form of the production if they want to control costs, manage the results of the discovery and comply with their respective burdens on a discovery motion. To do so, all counsel must have a firm and detailed grasp as to why the ESI that is sought by either side is relevant (or not) to the substantive issues in the case, the location and accessibility of the data on active and/or back-up systems, the volume and format of the data, and the associated cost of searching and producing that data. Given the level of detail required to facilitate efficient and defensible ESI discovery, it is advisable that counsel meet and confer as early as possible, regardless of whether the Act requires a formal meet and confer session as a prerequisite to conducting discovery.

**Third Parties:** The new procedural requirements apply similarly to third party subpoenas seeking production of ESI. (Section 1985.8.) However, the Act provides that the party seeking ESI has an additional affirmative obligation to take "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." (Section 1985.8 (j).) Consistent with that obligation, the Act further provides that any court order "shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance [with the subpoena]." (Section 1985.8 (k).)

**Safe-Harbor:** The Act contains a safe-harbor provision comparable to the federal rules related to ESI that has been lost or destroyed as "the result of the routine, good faith operation of an electronic information system." However, it also reminds litigants (and potential litigants) about the affirmative obligation to preserve evidence once litigation can reasonably be anticipated. (Sections 1985.8 (l), 2031.060 (i), and 2031.310 (j).) Accordingly, the safe-harbor will

not protect those litigants who fail to control or otherwise impose holds on their internal ESI destruction policies.

**Conclusion:** Counsel is strongly encouraged to immediately take the time to read the revised Discovery Act from beginning to end. Due to the urgency clause, the revised Act is effective immediately. Discovery of ESI is now an express standard in all California litigation. Counsel should therefore expect to meet and confer and prepare requests and responses that are consistent with the new requirements.

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**MARIN COUNTY  
LEGAL PROFESSIONALS  
ASSOCIATION**

A professional organization for legal assistants

**NEXT MEETING:**

Thursday, August 6th,  
6 pm, Café Arrivederci  
11 G Street, San Rafael

**SPEAKER/TOPIC:**

Ali Quam,  
Family Law Facilitator & Legal Self-Help

**RSVP/INFO:**

Kristi L. Edwards, CCLS,  
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**FUTURE SPEAKERS:**

Sept. - Julia Wald, Esq.  
Oct. - Hon. Verna A. Adams