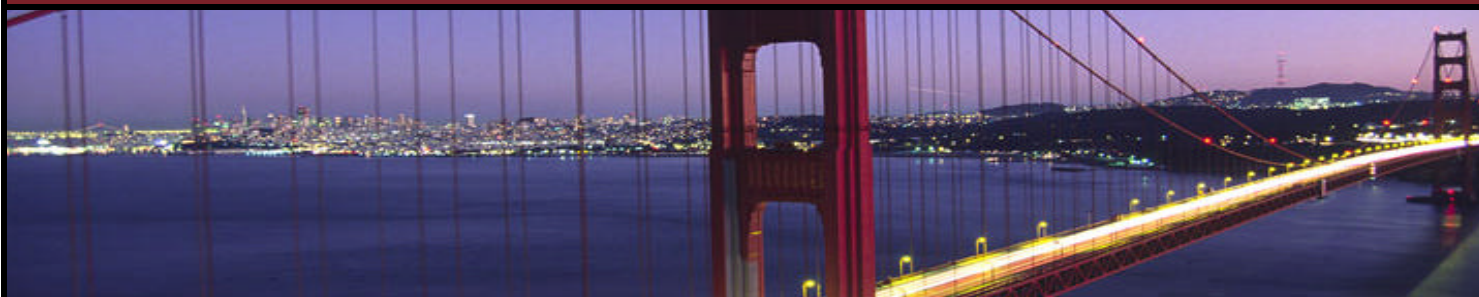




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*Burnham Brown represents a wide variety of clients in the retail and hospitality industry. Through an interdisciplinary approach that combines expertise and resources from multiple legal specialties, the firm is well equipped to service client needs. This group regularly provides business counseling and litigation services to clients in an efficient and cost effective manner.*

*Our firm has a long history of providing skilled and knowledgeable advocates in civil litigation involving a wide variety of commercial and business issues. Centrally located in Oakland, Burnham Brown is well positioned to serve clients throughout Northern California.*

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## The Impacts of Electronic Information on Litigation

The electronic data and email we use every day has now become part of what is discoverable in litigation. Never before have companies needed to concern themselves with retention of electronically stored data. Now, however, both the Federal and California Rules of Civil Procedure require that parties produce electronic data and information. This issue is most commonly addressed in litigation when one party seeks production of electronic information, i.e. emails, data compilations, etc. from another party. The parties must then determine who has the burden to pay for the production of the electronic information and how readily accessible is the information.


### A. Federal Courts

Federal Rules of Civil Procedure rules 26 through 37 govern discovery in civil actions. Rule 26(b) (1) provides a very broad scope for the discovery of documents. The statute states in part that "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense..." Accordingly, so long as the information or documents are not privileged and relevant to the interrogatory, they can be discoverable. Unlike the code in California, the Federal rules also specifically address electronically stored information. Rule 26(b)(2) states in pertinent part that "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Rule 26(b) (2) also provides that the court has ultimate discretion in determining the burden and accessibility of the documents.

To date most of the litigation in the Federal Courts relating to electronic discovery involve the interpretation of the federal statutes, specifically the phrase "reasonably accessible," and who has the burden to pay for the production.<sup>1</sup>

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<sup>1</sup>See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (DC NY 2003); Rowe Entertainment, Inc. v. The Williams Morris Agency, Inc., 205 F.R.D. 421 (DC NY 2002).



As a general rule in both state and federal courts, the party who is producing the documents incurs the expense associated with the production. However, with electronic production it can be costly to access and produce the information. For example, in the Zubulake v. UBS Warburg LLC<sup>2</sup>, UBS was required to spend hundreds of thousands of dollars in accessing and producing the electronically stored information. Accordingly, it is up to the courts to try to evaluate whether the benefit of the information outweighs the burden of production.

## **B. California Courts**

Currently, there are several proposals before the California Judicial Council to amend the Code of Civil Procedure to expressly address the production of electronic documents. Many of the proposals mirror the Federal Rules discussed above. Currently, however, California Code of Civil Procedure section 2031.280 addresses which party shall burden the expense associated with production. Section 2031.280(c) provides:

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.

The California Court of Appeals in Toshiba America Electronic Components, Inc. v. Superior Court<sup>3</sup> addressed similar issues faced by the Federal Courts. The court analyzed which party had the burden to incur the expense associated with the production of electronic documents. Toshiba estimated that it was going to cost approximately \$1.5 to \$1.9 million to comply with the discovery requests propounded by Lexar. The Toshiba court analyzed the general rule of burden-shifting in document production. The Court's decision mirrored the Federal Courts' decisions and held that the issues must be analyzed on a case-by-case basis.

## **C. Tips For Documentation Production and Retention**

The proposals currently before the California Judicial Council and the current Federal Rules of Civil Procedure demonstrate that companies need to begin thinking about how to store and keep their electronic information and data. Unfortunately, companies must keep this information knowing that there is a very real possibility that one day it will need to be produced in litigation. The following are some tips for preparing your company for electronic production:

1. Understand how your company stores its electronic information;
2. Create guidelines for how long your company maintains electronic information (this may be governed by statute);
3. Create guidelines for who may access the electronic information;
4. Create guidelines for "backing up" electronic information; and
5. Meet with your counsel early to discuss the electronic information.

Electronic documentation and information has made our lives much easier, however, companies need to be aware that much of that information will need to be produced should litigation arise. Accordingly, planning ahead can help avoid future problems.

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<sup>2</sup> 217 F.R.D. 309 (DC NY 2003)

<sup>3</sup> 124 Cal.App.4th 762 (2004)