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CALIFORNIA'S ELECTRONIC DISCOVERY ACT 2009

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On June 29, 2009, Governor Arnold Schwarzenegger signed California's Electronic Discovery Act (AB 5, Evans), which took effect immediately as urgency legislation. The Electronic Discovery Act, or EDA, represents California's first set of electronic discovery regulations and offers litigants specific definitions of what constitutes electronically stored information.

The new state law closely mirrors existing federal law. In general, it allows parties responding to requests for electronic discovery to object to the production of records they deem inaccessible as long as the protected category of information is specified. One distinction is in so-called "safe harbor" protections; *i.e.*, federal law shields responding parties from sanctions who delete data in "good faith" and during "routine" uses of computer systems, while this newly-enacted California law extends the protection to responding parties who alter, damage or overwrite data in the course of operation.

Here's some basic information that you should know about the EDA:

- Establishes procedures for obtaining discovery of electronically stored information from parties as well as nonparties.
- Generally requires that electronically stored information be produced in the form or forms in which the information is ordinarily maintained or in a form that is reasonably usable.
- Provides that if a demand is made for electronically stored information in a specified form, the opposing party may object by stating in its response the form in which it intends to produce the information.
- Allows a party to object to a demand for production on the basis that the information is not reasonably accessible because of the undue burden or expense. The opposing party bears the burden of demonstrating the undue burden or expense, but the court may nonetheless order discovery if the demanding party shows good cause.
- Incorporates existing rules on sanctions in the Civil Discovery Act (*California Code of Civil Procedure* § 2016.010) to electronic discovery but prohibits sanctions on a party for failing to provide electronically stored information that has been lost, damaged, altered, or overwritten as the result of the routine, good faith operation of an electronic information system.

So how does this new law affect you? For starters, it may mean that in any litigation case, the opposing party is allowed to request and even inspect and test how your electronic information is stored. The law does not require that you store your data in any particular manner, but that if it is stored and maintained in any particular manner, you will need to produce those electronically stored records in that manner. However, you will not get penalized if data is lost, damaged, altered or overwritten as part of routine maintenance or operation of your system.

Neither the EDA or the Civil Discovery Act defines "electronically stored information" within its provisions, but the term potentially covers a sweeping category, including e-mail, voice-mail, instant messages, text messages, documents, spreadsheets, databases, digital images, diagrams and other digital forms requiring the use of computer hardware or software. Further, the information may be stored on a variety of electronic media, such as hard drives, flash drives, computers, and handheld devices.



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For more information, or for any questions, feel free to contact Glenn Mau, email: gmau@archernorris.com, or any of the other attorneys at Archer Norris: www.archernorris.com.

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Glenn Mau is a partner at Archer Norris and manages complex transactions and litigation for the real estate development and construction industry and related businesses. Enhancing his real estate practice, Glenn defends finance companies from breach of contract, fraud and Truth-In-Lending violation claims and defends and prosecutes enforcement actions on behalf of homeowners associations. He also has considerable experience representing parties in construction defect litigation and mechanics' lien law issues.

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