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California Passes New Electronic Discovery Act Effective Immediately

On June 29, 2009, Governor Schwarzenegger signed into law [California's Electronic Discovery Act](#), which is effective immediately. All discovery propounded or responded to must now comply with the new law. These rules are very similar to the recent revisions to the Federal Rules of Civil Procedure, and bring California in line with the federal e-discovery standards.

Under the new Act, the party requesting production of electronically stored information (ESI) may specify the format in which it should be produced (e.g., native format, or TIFF, with or without certain metadata, etc.). If no format is specified, the responding party must produce the ESI in either the same format as it is ordinarily kept (likely in native format or an archived/compressed format) or in a "reasonably usable" form. The responding party need only produce the ESI in one form. If a requesting party fails to specify the format of production in its request, and the responding party produces the ESI in a "reasonably usable format," the requesting party cannot then compel a different form of production.

A responding party can resist production of ESI on the grounds that it is not "reasonably accessible." The factors for determining inaccessibility are undue burden and cost. If a responding party claims that ESI is inaccessible, though, it must still identify the types or categories of sources of ESI that it asserts are not reasonably accessible.

A responding party can resist production of ESI that it claims is not reasonably accessible by moving for a protective order or by opposing or objecting to the subpoena or request. The responding party has the burden of proving that the ESI is not reasonably accessible. Once that burden is met, the burden shifts to the requesting party to show good cause for production despite the fact that the ESI is not reasonably accessible.

If good cause is shown, the court may still order production with conditions, including cost-shifting. The factors that the courts may consider in determining good cause are similar to the federal criteria, including: the existence of more accessible sources; duplicative nature of the discovery sought; the cost of accessing the ESI versus the party's need for the discovery; the importance of the issues involved; the amount in controversy; and the parties' resources.