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## **ELECTRONIC DISCOVERY RULES NOW IN-EFFECT IN CALIFORNIA**

by: Sarah P. Gates, Esq.

What does this have to do with me? The short answer: everything! By now we are all accustomed to using technology such as e-mail in our everyday lives. While it is undeniable that e-mail is a necessity in today's world, it's important to recognize one simple fact: The message you hastily send today may be "Exhibit A" in the court of law tomorrow. Bottom-line: If your email discusses a subject that you would rather not share with the world, reconsider sending the information via email.

After more then a year in the making, California Electronic Discovery statutes became effective on June 29, 2009. The act effectively does two things to current California civil discovery rules. First, it expands the scope of the civil discovery act to include Electronically Stored Information, often referred to as "ESI". ESI includes information which exists in electronic or digital format such as e-mail, photos, written or scanned documents or images. Typically, ESI exists both on home and workplace computers, laptop computers or other devices such as blackberries and i-phones. Second, the Discovery statutes lay out ground rules as the manner in which ESI is to be requested and produced.

What does all of this mean? It means that disclosure of e-mail and other ESI in the course of civil litigation is quickly becoming commonplace. The reality is that we cannot simply send an e-mail and expect that it will never become "evidence" in the courtroom. Should we stop using e-mail? Of course not. However, one should be aware of the likelihood that workplace or personal e-mail may be disclosed in litigation, or simply that e-mails may be saved indefinitely and forwarded to others without your knowledge. The enacting of new discovery rules make the perfect time to brush up on how best to utilize e-mail to your advantage while balancing the potential for unintended disclosure.

### **E-MAIL ETIQUETTE**

Remembering a few simple tips when composing or responding to an e-mail can reduce the chances that your communications will be misinterpreted and may also reduce litigation costs:

**The Basics:** Check your spelling and punctuation. While seemingly a no-brainer, this tip is worth repeating. Make sure your message is spelled and punctuated properly and your e-mail will have a better chance of being understood and interpreted as intended.

**Just Don't Do It:** Refrain from sending jokes, offensive material or purely personal communications via company e-mail. If you do use e-mail for these purposes, delete these message immediately from your inbox, sent items and deleted items boxes so they do not clog company servers for eternity.

**Delete All Non-Essential Non-Business E-Mails:** If you receive daily non-business e-mails such as horoscopes or even industry publications, read them and delete them.. There is no reason why your employer should archive such material. Additionally, if these types of e-mails are not deleted, they

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often become part of a massive e-mail database which must be reviewed by attorneys in litigation. This makes the discovery process more costly.

**Professionalism:** When we send a work related e-mail, you do so as a representative of your employer. It's important to note that e-mails also leave a more significant "paper" trail than hardcopies because there will automatically be multiple copies (sender, recipient, cc, bcc) the moment the e-mail is sent. Additionally, the life span of an e-mail can be infinite. Once backed up by an archiving system, the e-mail is preserved indefinitely.

**Effective Communication:** Communicating effectively should always be the goal. Not only is effective communication more efficient, but there is less chance that the e-mail will be misinterpreted or that an inference of illicit conduct will be drawn. The effectiveness of your e-mail communication can be enhanced doing the following:

Include a subject line. This makes the e-mail easier to sort later and provides context for the message itself.

All attachments should be properly and descriptively labeled.

Keep messages short and focused, but use complete sentences. Short paragraphs are easier to understand as the information can be digested more efficiently.

Avoid generalities and stick to relevant details while weeding out unnecessary information. This will help limit the number of messages sent back and forth.

If appropriate, consider an old fashioned phone call. Talking to one another is often the best communication tool.

**Avoid Assumptions:** Remember that there are no verbal or non-verbal cues with e-mail, so they are often misunderstood. If you are unsure what the writer of an e-mail means, ask.

**Watch your language:** Remember your audience and use appropriate formality. You never know who will be reading your correspondence in the future. Each e-mail you send should reflect your employer's commitment to quality, culture and regulatory compliance. Additionally, the tone of your e-mail should reflect your relationship with the intended recipient. For example, if you are a consultant to the person you are e-mailing, the tone of your message should reflect that you are providing a service, not issuing a directive.

**Use "Reply All" With Caution:** Ideally, your message should be sent only to those to whom the e-mail applies. However, pay particular attention to the recipients of the e-mail to make sure all necessary parties are included.

**Practice "Courteous" Forwarding:** When forwarding an e-mail to a new party, make sure the original message is one which is appropriate to pass on to others. Some e-mail messages contain information or commentary that was not intended to be shared.

**Start Fresh:** Avoid opening and using an old e-mail to begin a new conversation, especially if the conversation begins as business and eventually leads to a personal or unprofessional discussion.

**Avoid Graphics and Backgrounds:** These nifty little e-mail details turn into attachments when the e-mail is forwarded from one recipient to the next. If your e-mails are subject to discovery, review of those added attachments by attorneys can greatly increase the cost of litigation.

## PRIVILEGED E-MAILS: PROTECTING YOUR COMMUNICATIONS

E-mail in the context of the attorney-client privilege presents a unique set of issues. In order to prevent inadvertent disclosure of privileged information and to provide the communication a better chance of withstanding attack, all communications which are intended to be protected by attorney-client privilege should be identified as such.

Each e-mail should convey the fact that privileged information is being communicated. This can be accomplished by:

Adding "PRIVILEGED & CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION" to the subject line of each privileged e-mail.

If a conversation evolves into a privileged communication, update the subject line.

Include a short statement in the e-mail itself which conveys the intent that the conversation be confidential.

If you are acting at the direction of an Attorney, indicate that in the e-mail itself.

While the Electronic Discovery Rules include a "claw back" provisions<sup>1</sup> for the inadvertent disclosure of privileged documents, the smarter practice is to be proactive and protect the privileged communication for the beginning.

The use of e-mail is certainly a necessity in today's world, but one should nonetheless be cautious as Electronic Discovery rules continue to develop. Practicing good e-mail etiquette may not only increase efficiency but may also help to protect privileged communication.

Sarah Gates is a Senior Attorney with the firm of Wroten & Associates and maintains a diverse litigation practice and specializes in handling complex discovery and e-discovery, case investigation as well as witness and trial preparation. Ms. Gates' practice focuses on the defense of nursing homes and residential care facilities and includes provision of ancillary services to the long-term care provider such as restraining orders, unlawful detainers and development of litigation guidelines and best practices.

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<sup>1</sup> Section 2031.285 of the California Code of Civil Procedure provides a mechanism for claiming privilege has been made, the party receiving the information is precluded from using or disclosing it until the claim is resolved.