

**THE IMPACT OF ASSEMBLY BILL NO. 5 ON CALIFORNIA DESIGN
PROFESSIONAL LITIGATION
By: Michael M. Edwards, Esq.**

Assembly Bill No. 5 (“AB 5”) was approved by Governor Arnold Schwarzenegger on June 29, 2009. This Bill creates new rules regarding the production of electronically stored information (“ESI”) during the civil discovery process. AB 5 is substantially similar to the Federal Rules of Civil Procedure related to the production of ESI, which have been in effect for several years. The legislature has now engrafted another burden on design professionals in litigation. AB 5 establishes procedures for a person to obtain discovery of electronically stored information, in addition to other documents that are produced in litigation. Specifically, AB 5 permits discovery of ESI, e.g., CAD files, emails, etc.

The practical impact of AB 5 is that opposing parties can now request production of a design professional’s ESI electronically stored information. This now calls for a response indicating the form in which this information will be produced. Generally, electronically stored information is produced as it is “ordinarily maintained”; however, if another form is requested (e.g. data in its native condition), a design professional is required to seek a protective order objecting to the demand for production. If the demanding party shows good cause, a court can order its production, if it is kept in the ordinary course of business; however, if undue burden and expense can be shown, the court can order the requesting party to pay for the production of same. In addition to the foregoing, AB 5 also imposes special ESI retention measures on parties to litigation. These measures include changing how a company maintains and stores its data after the commencement of litigation.

For some time, ESI has been the subject of document production requests in design professional litigation. In a recent case, our client was required to produce over 100,000 emails. This necessitated the copying of the emails in hard form, reviewing, redacting, and checking same for privileged information. As you can imagine, the cost and expense involved in the production of ESI is substantial.

Further, a party can request the production of all emails, including internal and draft emails. Unfortunately, people have a tendency to write things in emails that they would never say aloud. As a result, it is essential that design professionals and their employees be careful as to what is said in an email. In other words, there should be no criticism, internally, of the firm’s production and/or quality of work, or its design team members, nor should there be personal comments about others or clients. Additionally, the propounding party can request further ESI discovery in the form of erased or discarded emails and can obtain access to your server; consequently, it is imperative that emails remain neutral, and possibly even self-serving, at all times, as even deleted emails can resurface at a later date and time.

Even the simplest project can generate hundreds of emails internally and/or externally (e.g., with the owner and/or co-consultants). Extreme care must be taken about what is said in email. Words often have different meanings, and even seemingly innocent comments can be misread, or twisted, by others at a later time.

In short, discovery of ESI is here to stay and will only become more commonplace. Accordingly, the design professional must plan ahead and take some basic precautions to ensure that ESI production does not become a disaster.

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Mike's areas of concentration are contract law, contract negotiations, construction litigation, professional liability (specializing in defense of architects and engineers) and real estate and employment law. He is the author of "Liability for Innovative but Unproven Designs," Cushman/Hedemann, Architect and Engineer Liability: Claims Against Design Professionals (Second Ed. 1995).

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