

D R A F T
FOR APPROVAL

**UNIFORM RULES RELATING TO DISCOVERY OF
ELECTRONICALLY STORED INFORMATION**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**UNIFORM RULES RELATING TO DISCOVERY OF
ELECTRONICALLY STORED INFORMATION**

WITH PREFATORY AND REPORTER'S NOTES

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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UNIFORM RULES RELATING TO DISCOVERY OF ELECTRONICALLY STORED INFORMATION

PREFATORY NOTE

With very few exceptions, when the state rules and statutes concerning discovery in civil cases were promulgated and adopted, information was contained in documents in paper form. Those documents were kept in file folders, filing cabinets, and in boxes placed in warehouses. When a person or business or governmental entity decided a document was no longer needed and could be destroyed, the document was burned or shredded and that was the end of the matter. There was rarely an argument about sifting through the ashes or shredded material to reconstruct a memo which had been sent.

In today's business and governmental world, paper is a thing long past. By some estimates, 93 percent or more of corporate information was being stored in some sort of digital or electronic format.¹ This difference in storage medium for information creates enormous problems for a discovery process created when there was only paper. Principal among differences is the sheer volume of information in electronic form, the virtually unlimited places where that information may appear, and the dynamic nature of electronic information. These differences are well documented in the lengthy quote which follows from the report of the Advisory Committee on the Federal Rules of Civil Procedure (Civil Rules Advisory Committee). This report recommended adoption of new Federal Rules to accommodate the differences.

The *Manual for Complex Litigation* (4th) illustrates the problems that can arise with electronically stored information.

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes is the equivalent of 720 typewritten pages of plain text. A CD-ROM with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

Electronically stored information may exist in dynamic databases that do not correspond to hard copy materials. Electronic information, unlike words on paper, is dynamic. The ordinary operation of computers - including the simple act of turning a computer on and off or accessing a particular file - can alter or destroy electronically stored information, and computer systems automatically discard or overwrite as part of their routine operation. Computers often automatically create information without the operator's direction or awareness, a feature with no direct counterpart in hard copy materials. Electronically stored information may be

¹ "How much information 2003?" at www.sims.berkeley.edu/research/projects/how-much-info-2003.

“deleted” yet continue to exist, but in forms difficult to locate, retrieve or search. Electronic data, unlike paper, may be incomprehensible when separated from the system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery.²

The report from which this quote is taken is the work product of a six-year effort by the Civil Rules Advisory Committee. The effort began in 2000, when that Committee conducted a series of national conferences to determine whether the Federal Rules should be amended to accommodate the differences between information contained in paper documents and electronically stored information. The Civil Rules Advisory Committee ultimately promulgated a package of rules amendments for public comment in August of 2004. That package contained amendments to (1) provide early attention to electronic discovery issues, (2) provide better management of discovery into electronically stored information, (3) set out a procedure for assertions of privilege after production, (4) clarify the application of the rules relating to interrogatories and requests for production of documents to electronically stored information, and (5) clarify the application of the sanctions rules to electronically stored information.

The proposed Federal Rules amendments generated tremendous interest from the bench and bar. The Committee held public hearings on the proposed amendments in late 2004 and early 2005. Seventy-four witnesses testified, many of whom also submitted written comments. An additional 180 other written comments were submitted. The Committee used the information gained during the public comment period to further revise the rules. The revised rules package became effective on December 1, 2006.

The NCCUSL Drafting Committee held its initial meeting on April 21-22, 2006 in Detroit, Michigan. At that time, the Drafting Committee decided not to reinvent the wheel. It was the Drafting Committee’s judgment that the significant issues relating to the discovery of information in electronic form had been vetted during the Federal Rules amendment process. Accordingly, this draft mirrors the spirit and direction of the recently adopted amendments to the Federal Rules of Civil Procedure. The Drafting Committee has freely adopted, often verbatim, language from both the Federal Rules and comments that it deemed valuable. The rules are modified, where necessary, to accommodate the varying state procedures and are presented in a form that permits their adoption as a discrete set of rules applicable to discovery of electronically stored information.

The draft originally took the form of a proposed statute entitled “Uniform Discovery of Electronic Records Act”. At the request of the Drafting Committee, on November 14, 2006, the NCCUSL Executive Committee authorized that the draft take the form of proposed judicial rules and be re-titled “Uniform Rules Relating to Discovery of Electronically Stored Information”.

² Report of the Civil Rules Advisory Committee dated May 17, 2004 and revised August 3, 2004.

1 **UNIFORM RULES RELATING TO DISCOVERY OF**
2 **ELECTRONICALLY STORED INFORMATION**

3
4 **RULE 1. DEFINITIONS.** In these rules:

5 (1) “Discovery” means the process of providing information in a civil proceeding in the
6 courts of this state pursuant to [insert reference to state rules of civil procedure] or these rules.

7 (2) “Electronic” means relating to technology having electrical, digital, magnetic,
8 wireless, optical, electromagnetic, or similar capabilities.

9 (3) “Electronically stored information” means information that is stored in an electronic
10 medium and is retrievable in perceivable form.

11 (4) “Person” means an individual, corporation, business trust, estate, trust, partnership,
12 limited liability company, association, joint venture, public corporation, government or
13 governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

14 ***Judicial Note***

15 *The term “civil proceeding” as used in the definition of “Discovery” may need to be*
16 *modified in certain states to specify that it includes civil courts with differing or limited*
17 *jurisdiction within the same state. As the term is used in subsection (1), it is intended to*
18 *encompass not only civil courts of general jurisdiction, but also courts of limited jurisdiction*
19 *such as domestic relations and probate courts. The term is used in various rules, including*
20 *Rules 3, 4 and 7.*

21 **Reporter’s Notes**

22
23 The definition of “electronically stored information” is intended to encompass future
24 developments in computer technology. The rules are intended to be broad enough to cover all
25 types of computer-based information, and flexible enough to encompass future changes and
26 development. The term “electronically stored information” is derived from the Federal Civil
27 Rule Amendments effective December 1, 2006, and, like its NCCUSL equivalent terms
28 “information” and “record”, is intended to be expansive and to encompass any type of
29 information that is stored electronically.
30
31

1 The term “electronically stored information” is not intended to include traditional
2 “writings” (i.e., information stored solely on paper or another tangible, non-electronic, medium).
3 Discovery of “writings” is the subject of existing rules of civil procedure.
4

5 **RULE 2. SUPPLEMENTAL RULES OF DISCOVERY.** Unless displaced by
6 particular provisions of these rules, [insert reference to state rules of civil procedure] supplement
7 these rules.

8 **Reporter’s Notes**

9 These rules are not intended to apply to cases where discovery of electronically stored
10 information is not likely. Existing rules of civil procedure govern discovery in such cases. To
11 the extent not inconsistent with particular provisions of these rules, existing rules of civil
12 procedure in the applicable state supplement discovery of electronically stored information.
13

14 **RULE 3. CONFERENCE, PLAN AND REPORT TO THE COURT.**

15 (a) Not later than [21] days after each responding party first appears in a civil
16 proceeding, all parties that have appeared in the proceeding shall confer concerning whether
17 discovery of electronically stored information is reasonably likely to be sought in the proceeding,
18 and if so the parties at the conference shall discuss:

19 (1) any issues relating to preservation of discoverable information;

20 (2) the form in which each type of the information will be produced;

21 (3) the period within which the information will be produced;

22 (4) the method for asserting or preserving claims of privilege or of protection of
23 the information as trial-preparation materials, including whether such claims may be asserted
24 after production;

25 (5) the method for asserting or preserving confidentiality and proprietary status of
26 information relating to a party or a person not a party to the proceeding;

1 (6) whether allocation among the parties of the expense of production is
2 appropriate; and,
3 (7) any other issue relating to the discovery of electronically stored information.
4 (b) If discovery of electronically stored information is reasonably likely to be sought in
5 the proceeding, the parties shall:
6 (1) develop a proposed plan relating to discovery of the information; and
7 (2) not later than [14] days after the conference under subsection (a), submit to
8 the court a written report that summarizes the plan and states the position of each party as to any
9 issue about which they are unable to agree.

10 **Reporter's Notes**

11 There is almost universal agreement that early attention to issues relating to the discovery
12 of electronically stored information, including preservation issues, facilitates orderly discovery.
13 This rule imposes jointly on the parties the obligation to discuss issues relating to the discovery
14 of electronically stored information at the outset of the case, and as each additional party appears
15 in the proceeding. While the rule requires more than one conference and report when additional
16 parties appear in the action, it may be preferable that the parties ultimately prepare a single,
17 comprehensive report.

18
19 The parties are required to confer regarding the form or forms of production, which may
20 include the extent to which metadata or types of embedded data, if present, are to be preserved
21 and produced. The parties should also confer regarding the form or forms in which each type of
22 the information is to be maintained prior to final resolution, by the court or the parties, of issues
23 relating to the form of production.

24
25 Some local Federal Rules require counsel, in advance of this sort of a conference, to
26 review the potential production of electronically stored information with the client in order to
27 understand how information is stored and how it can be retrieved. While this rule does not
28 expressly impose such an obligation, counsel's meaningful participation in the conference and
29 compliance with discovery obligations require that counsel promptly and diligently familiarize
30 themselves with their clients' information systems to the extent they may be relevant to the
31 issues in dispute. Information systems are complex, and exhibit emergent and self-organizing
32 properties. Often no one person will have a complete understanding of any single information
33 system.

34
35 The discussion contemplated by this rule would encompass all facets of the discovery of

1 electronically stored information. This conference may be combined with any other conference
2 related to discovery required by state rule or statute or by the court.
3

4 The rule also requires the parties to discuss any issues relating to privilege or to
5 protection as trial preparation materials that may arise during the course of discovery. Because
6 of the sheer volume of electronically stored information that may be produced, pre-production
7 review of the information is often time consuming and expensive. Counsel may wish to explore
8 the possibility of entering into agreements that would allow production without waiver of
9 privilege or protection as trial preparation materials.
10

11 The rule requires the parties to file a report with the court concerning the discovery of
12 electronically stored information. In states where such a discovery report is otherwise required,
13 information required to be provided by this rule may simply be included in that report.
14

15 Any issues about which the parties were unable to reach agreement may be resolved by
16 the court pursuant to Rule 4.
17

18 **RULE 4. ORDER GOVERNING DISCOVERY.**

19 (a) In a civil proceeding, the court may issue an order governing the discovery of
20 electronically stored information pursuant to:

21 (1) a motion by a party seeking discovery of the information or by a party or
22 person from which discovery of the information is sought;

23 (2) a stipulation of the parties and of any person not a party from which discovery
24 of the information is sought; or

25 (3) the court's own motion, after reasonable notice to, and an opportunity to be
26 heard from, the parties and any person not a party from which discovery of the information is
27 sought.

28 (b) An order governing discovery of electronically stored information may address:

29 (1) whether discovery of the information is reasonably likely to be sought in the
30 proceeding;

31 (2) preservation of the information;

- 1 (3) the form in which each type of the information is to be produced;
- 2 (4) the time within which the information is to be produced;
- 3 (5) the permissible scope of discovery of the information;
- 4 (6) the method for asserting or preserving claims of privilege or of protection of
- 5 the information as trial-preparation material after production;
- 6 (7) the method for asserting or preserving confidentiality and the proprietary
- 7 status of information relating to a party or a person not a party to the proceeding;
- 8 (8) allocation of the expense of production; and
- 9 (9) any other issue relating to the discovery of the information.

10 **Reporter's Notes**

11 Although this rule does not expressly require the court to issue an order relating to
12 discovery of electronically stored information, courts are strongly encouraged to do so. Early
13 intervention by the court may facilitate orderly discovery of such information and avoid
14 difficulties later in the case.

15
16 The rule permits the court to issue an order relating to discovery of electronically stored
17 information pursuant to motion of a party, stipulation of the parties, or on the court's own motion
18 but only after providing the parties notice and an opportunity to be heard.
19

20 **RULE 5. LIMITATION ON SANCTIONS.** Absent exceptional circumstances, the
21 court may not impose sanctions on a party under these rules for failure to provide electronically
22 stored information lost as the result of the routine, good-faith operation of an electronic
23 information system.

24 **Reporter's Notes**

25 This rule is identical to its Federal Rule equivalent, Federal Rule 37(f). As noted in the
26 comments to Federal Rule 37(f), the rule responds to a distinctive feature of electronic
27 information systems, the routine modification, overwriting, and deletion of information that
28 attends normal use. Under this rule, absent exceptional circumstances, sanctions cannot be
29 imposed for loss of electronically stored information resulting from the routine operation of the

1 party's electronic information system if that operation was in good faith.
2

3 This rule applies to information lost due to the routine operation of an information system
4 only if the system was operated in good faith. Good faith may require that a party intervene to
5 modify or suspend features of the routine operation of a computer system to prevent loss of
6 information if that information is subject to a preservation obligation. When a party is under a
7 duty to preserve information because of pending or reasonably anticipated litigation, such
8 intervention in the routine operation of an information system is one aspect of what is often
9 called a "litigation hold". A party cannot exploit the routine operation of an information system
10 to evade discovery obligations by failing to prevent the destruction of stored information it is
11 required to preserve.
12

13 The steps the party takes to design and implement an effective and appropriate litigation
14 hold are important to determining whether the routine operation of the information system was in
15 good faith. Similarly, agreements the parties reached, or orders the court entered, calling for
16 preservation of specific electronically stored information bear on whether the routine operation
17 of the electronic information system continued to be in good faith.
18

19 This rule restricts the imposition of sanctions. It does not prevent a court from making
20 the kinds of adjustments frequently used in managing discovery if a party is unable to provide
21 relevant responsive information. For example, a court could order the responding party to
22 produce an additional witness for deposition, respond to additional interrogatories, or make
23 similar attempts to provide substitutes or alternatives for some or all of the lost information.
24

25 **RULE 6. REQUEST FOR PRODUCTION.**

26 (a) In a civil proceeding, a party may serve on any other party a request for production of
27 electronically stored information and for permission to inspect, copy, test, or sample the
28 information.

29 (b) A party on which a request to produce electronically stored information has been
30 served shall, in a timely manner, serve a response on the requesting party. The response must
31 state, with respect to each item or category in the request:

32 (1) that inspection, copying, testing, or sampling of the information will be
33 permitted as requested; or

34 (2) any objection to the request and the reasons for the objection.

1 **Reporter's Notes**

2 This rule is intended to establish that the discovery of information in electronic form
3 stands on an equal footing with discovery of paper documents.
4

5 **RULE 7. FORM OF PRODUCTION.**

6 (a) A party requesting production of electronically stored information may specify the
7 form in which each type of electronically stored information is to be produced.

8 (b) If a party responding to a request for production of electronically stored information
9 objects to a specified form for producing the information, or if no form is specified in the
10 request, the responding party shall state in its response the form in which it intends to produce
11 each type of the information.

12 (c) Unless the parties otherwise agree or the court otherwise orders:

13 (1) if a request for production does not specify a form for producing a type of
14 electronically stored information, the responding party shall produce the information in a form in
15 which it is ordinarily maintained or in a form that is reasonably usable; and

16 (2) a party need not produce the same electronically stored information in more
17 than one form.

18 **Reporter's Notes**

19 The form of production is more important to the exchange of electronically stored
20 information than it is to the exchange of paper documents. The rule recognizes that
21 electronically stored information may exist in multiple forms, and that different forms of
22 production may be appropriate for different types of electronically stored information. The rule
23 allows the requesting party to specify the form or forms and allows the responding party to
24 object, and creates a default rule for production if no form is specified.
25

26 **RULE 8. LIMITATIONS ON DISCOVERY.**

27 (a) A party may object to discovery of electronically stored information from sources

1 that the party identifies as not reasonably accessible because of undue burden or expense. In its
2 objection the party shall identify the reason for such undue burden or expense.

3 (b) On motion to compel discovery or for a protective order relating to the discovery of
4 electronically stored information, a party objecting bears the burden of showing that the
5 information is from a source that is not reasonably accessible because of undue burden or
6 expense.

7 (c) The court may order discovery of electronically stored information that is from a
8 source that is not reasonably accessible because of undue burden or expense if the party
9 requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely
10 burden or expense, taking into account the amount in controversy, the resources of the parties,
11 the importance of the issues, and the importance of the requested discovery in resolving the
12 issues.

13 (d) If the court orders discovery of electronically stored information under subsection (c)
14 it may set conditions for discovery of the information, including allocation of the expense of
15 discovery.

16 (e) The court shall limit the frequency or extent of discovery of electronically stored
17 information, even from a source that is reasonably accessible, if the court determines that:

18 (1) it is possible to obtain the information from some other source that is more
19 convenient, less burdensome, or less expensive;

20 (2) the discovery sought is unreasonably cumulative or duplicative;

21 (3) the party seeking discovery has had ample opportunity by discovery in the
22 proceeding to obtain the information sought; or

23 (4) the likely burden or expense of the proposed discovery outweighs the likely

1 benefit, taking into account the amount in controversy, the resources of the parties, the
2 importance of the issues, and the importance of the requested discovery in resolving the issues.

3 **Reporter's Notes**

4 This rule is designed to address the unique issues raised by the difficulties in locating,
5 retrieving and providing discovery of electronically stored information. Information that is from
6 sources that are reasonably accessible is subject to discovery without intervention of the court,
7 subject to the limitations generally applicable to discovery under the state's existing discovery
8 rules. Discovery of electronically stored information that is from sources that are reasonably
9 accessible is also subject to the limitation imposed by subsection (e) of this rule.

10
11 Discovery of electronically stored information that is from sources that are not reasonably
12 accessible is required, over objection, only upon a showing pursuant to subsection (c). The
13 decision whether to require the responding party to search for and produce information that is
14 from sources that are not reasonably accessible depends not only on the burden and expense of
15 doing so but also on whether the burden and expense can be justified in the circumstances of one
16 case. Appropriate considerations may include: (1) the specificity of the discovery request;
17 (2) the quantity of information available from other and more easily accessed sources; (3) the
18 failure to produce relevant information that seems likely to have existed but is no longer
19 available from more easily accessed sources; (4) the likelihood of finding relevant responsive
20 information that cannot be obtained from other, more easily accessed sources; (5) predictions as
21 to the importance and usefulness of the further information; and (6) a party's willingness to
22 voluntarily bear the cost of discovery. If the court orders discovery, the court may allocate to the
23 requesting party the expense, in whole or in part, of discovery.

24
25 Under this rule, a responding party should permit discovery of electronically stored
26 information that is relevant, not privileged and reasonably accessible. The responding party
27 must also identify, by category or type, the sources containing potentially responsive information
28 that the responding party is neither searching nor permitting discovery of on the ground it is not
29 reasonably accessible. The identification should, to the extent possible, provide enough detail to
30 enable the requesting party to evaluate the burden and expense of providing discovery and the
31 likelihood of finding responsive information from the identified sources.

32
33 A party's claim that electronically stored information is not reasonably accessible does
34 not relieve the party of its common-law or statutory duties to preserve evidence. Whether a
35 responding party is required to preserve unsearched sources of information that it believes are
36 not reasonably accessible depends on the circumstances of each case. It is often useful for the
37 parties to discuss this issue early in discovery. One fact that bears on the preservation obligation
38 is whether the responding party has a reasonable basis for believing that discoverable
39 information is only available from sources that are not reasonably accessible and not from other
40 reasonably accessible sources.

41

1 (b) Subject to subsections (c) and (d), Rules 7, 8 and 9 apply to a person responding to a
2 subpoena under subsection (a) as if that person were a party.

3 (c) A party serving a subpoena requiring production of electronically stored information
4 shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the
5 subpoena.

6 (d) An order of the court requiring compliance with a subpoena issued under this rule
7 must provide protection to a person that is neither a party nor a party's officer from undue
8 burden or expense resulting from compliance.

9 **Reporter's Notes**

10 This rule is intended to make the process for responding to a discovery request involving
11 electronically stored information and the process for responding to a subpoena congruent. This
12 rule is not intended to supplant protections under the state's existing rules governing discovery
13 afforded to a person responding to a subpoena. A person responding to a subpoena for
14 electronically stored information and parties responding to a discovery request stand on the same
15 footing and have the same rights and obligations. A party responsible for the issuance and
16 service of a subpoena, however, is under a special duty to avoid imposing undue burden or
17 expense on a person subject to the subpoena. The court shall enforce this duty whenever it is
18 breached.

19
20 This rule protects a person responding to a subpoena for production of electronically
21 stored information from undue burden or expense resulting from compliance with the subpoena.
22 In determining whether there is undue burden or expense, the court may consider, among other
23 factors, the existence of any relationship between such person and a party to the civil proceeding.
24

25 **RULE 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In

26 applying and construing these rules, consideration must be given to the need to promote
27 uniformity of the law with respect to its subject matter among the states that adopt these rules.

28 **RULE 12. REPEALS.** The following rules are repealed:

29

30 **RULE 13. EFFECTIVE DATE.** These rules take effect [insert effective date].