DRAFT

FOR DISCUSSION ONLY

UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

For February 2007 Drafting Committee Meeting

WITH PREFATORY AND REPORTER'S NOTES

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February 5, 2007

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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 will become 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 the Discovery of Electronically Stored Information".

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

UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

RULE 1. DEFINITIONS. In these rules:

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

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

(3) "Electronically stored information" means information that is stored in an electronic medium and is retrievable in perceivable form.

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

Reporter's Notes

The definition of "electronically stored information" is intended to encompass future developments in computer technology. The rules are intended to be broad enough to cover all types of computer-based information, and flexible enough to encompass future changes and development. The term "electronically stored information" is derived from the Federal Civil Rule Amendments and, like its NCCUSL equivalent terms "information" and "record", is intended to be expansive and to encompass any type of information that is stored electronically.

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

The term "machine readable" is a term of art pertaining to information that can be read and processed by a machine. (*See, IEEE Standard Computer Dictionary* (1990), definition of "machine readable".)

Judicial Note

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

RULE 2. APPLICABILITY.

(a) These rules supplement [insert reference to state rules of civil procedure].

Reporter's Notes

These rules are not intended to apply to cases where discovery of electronically stored information is not likely. Existing rules of civil procedure govern discovery in such cases. These rules supplement existing rules of civil procedure and are intended to be applied consistent therewith.

RULE 3. CONFERENCE CONCERNING DISCOVERY OF ELECTRONICALLY STORED INFORMATION; REPORT TO THE COURT.

(a) Not later than [21] days after each responding party makes an initial appearance in a civil proceeding, the parties shall confer concerning whether discovery of electronically stored information is reasonably likely to be sought in the proceeding. If discovery of electronically stored information is reasonably likely to be sought, the parties at the conference shall discuss:

(1) preservation of the information;

(2) the form in which the information will be produced;

(3) the time within which the information will be produced;

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

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

(6) whether allocation among the parties of the cost of production is appropriate; and,

(7) any other issue relating to the discovery of electronically stored information.

(b) If the parties agree that discovery of electronically stored information is reasonably likely to be sought in the proceeding, the parties shall develop a proposed plan relating to discovery of electronically stored information which indicates the positions and proposals of the parties concerning the matters listed in subsection (a).

(c) Attorneys of record and unrepresented parties that have appeared in a civil proceeding are responsible for jointly arranging the conference required under subsection (a), developing a proposed plan, and preparing a written report that summarizes the plan and specifies any issues about which the parties were unable to agree. Each attorney and unrepresented party shall participate in good faith in the conference. The report must be submitted to the court not later than [14] days after the conference.

Reporter's Notes

There is almost universal agreement that early attention to issues relating to the discovery of electronically stored information makes the discovery process more effective and cost-efficient. This rule requires the parties to discuss issues relating to the discovery of electronically stored information at the outset of the case, and as additional parties appear in the proceeding.

Some local Federal Rules require counsel, in advance of this sort of a conference, to review the potential production of electronically stored information with the client in order to understand how information is stored and how it can be retrieved. While this rule does not expressly impose such an obligation, counsel's meaningful participation in the conference and compliance with discovery obligations require that counsel promptly and diligently familiarize themselves with their clients' information systems. Information systems are complex, and exhibit emergent and self-organizing properties. Often no one person will have a complete

understanding of any single information system.

The discussion contemplated by this rule would encompass all facets of the discovery of electronically stored information. This conference may be combined with any other conference related to discovery required by state rule or statute or by the court.

The rule also requires the parties to discuss any issues relating to privilege that may arise during the course of discovery. Because of the sheer volume of electronically stored information that may be produced, privilege review is often time consuming and expensive. Counsel may wish to explore the possibility of entering into agreements that would allow production without privilege waiver.

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

Finally, any issues about which the parties were unable to reach agreement may be resolved by the court pursuant to Rule 4.

RULE 4. ORDER RELATING TO DISCOVERY OF ELECTRONICALLY STORED INFORMATION.

(a) The court may issue an order governing the discovery of electronically stored information pursuant to:

(1) a motion by a party seeking discovery of electronically stored information or by a party or person from which discovery of electronically stored information is sought;

(2) stipulation of the parties and, if the person from which discovery of electronically stored information is sought is not a party, that person; or

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

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

(1) whether discovery of electronically stored information is reasonably likely to

be sought in the proceeding;

(2) preservation of the information;

(3) the form in which the information is to be produced;

(4) the time within which the information is to be produced;

(5) the permissible scope of discovery of the information;

(6) the methods for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

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

(8) allocation of the expense of production; and

(9) any other issue relating to the discovery of electronically stored information.

Reporter's Notes

Although this rule does not expressly require the court to issue an order relating to discovery of electronically stored information at any particular stage of the proceeding, there is a general consensus that early intervention by the court on these issues may facilitate orderly and efficient discovery of electronically stored information, and avoid difficulties later in the case.

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

Reporter's Notes

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

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

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

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

RULE 6. REQUEST FOR PRODUCTION.

(a) In a civil proceeding, a party may serve on any other party a request for production of electronically stored information and for permission of the party making the request, or person acting on the requestor's behalf, to inspect, copy, test, or sample the information.

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

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

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

Reporter's Notes

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

RULE 7. FORM OF PRODUCTION.

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

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

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

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

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

Reporter's Notes

The form of production is more important to the exchange of electronically stored information than it is to the exchange of paper documents. This rule concerning the form of production is designed to make the discovery of electronically stored information more efficient and cost-effective. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. The rule allows the requesting party to specify the form, allows the responding party to object, and creates a default rule for production if no form is specified.

RULE 8. SCOPE OF DISCOVERY.

(a) Absent a court order to the contrary pursuant to subsection (c), a party is not required to provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense.

(b) On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party claiming that the information is not reasonably accessible because of undue burden or expense bears the burden of so demonstrating.

(c) Even if the party from which discovery of electronically stored information is sought establishes that the information is not reasonably accessible because of undue burden or expense, the court may order discovery if the requesting party shows good cause. In determining if good cause exists, the court shall consider whether:

(1) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive, or the discovery sought is unreasonably cumulative or duplicative;

(2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought;

(3) the likely benefit of the information outweighs the burden or expense of the proposed discovery, taking into account the needs of the case, the amount in controversy, the resources of the parties, the importance of the issues in the litigation, and the importance of the requested discovery in resolving the issues.

(d) If the court finds good cause for discovery, it may order allocation of the expense of production.

Reporter's Notes

This rule is designed to address issues raised by the difficulties in locating, retrieving and providing discovery of electronically stored information. Information that is reasonably accessible is subject to discovery without intervention of the court. Discovery of electronically stored information that is not reasonably accessible is permitted only upon a showing of good cause. The concept of accessibility is linked to undue burden or expense. If the information sought by the requesting party is on sources that are accessible only by incurring undue burden or expense, then that information is not discoverable without a showing of good cause.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged and reasonably accessible. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing discovery and the likelihood of finding responsive information on the identified sources.

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

Once it is established that a source of electronically stored information is not reasonably accessible, the court may still order that the information be produced if good cause is shown. The court may also order that the requesting party bear all or part of the expense of production. In making this determination, the court is required to consider certain factors specified in the rule. In addition, the court may consider additional factors, including (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; and (6) a party's willingness to voluntarily bear the cost of production.

RULE 9. CLAIMS OF PRIVILEGE OR PROTECTION AFTER PRODUCTION.

(a) If electronically stored information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any

party that received the information of the claim and the basis for the claim.

(b) After being notified of a claim of privilege or of protection under subsection (a), a party shall promptly return, sequester, or destroy the specified information, and any copies it has, and may not use or disclose the information until the claim is resolved. If the party that received the information disclosed it before being notified, the party shall take reasonable steps to retrieve the information.

(c) A party receiving a notice of claim of privilege or of protection under subsection (a) may promptly present the information to the court under seal for a determination of the claim. The producing party shall preserve the information until the claim is resolved.

Reporter's Notes

The risk of privilege waiver and the work necessary to avoid it add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver and the time and effort to avoid it can increase substantially because of the volume of electronically stored information and the difficulty of ensuring that all information to be produced has in fact been reviewed. This rule provides a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery and, if the claim is contested, permits any party that received the information to present the matter to the court for resolution. The rule does not address whether the privilege or protection that is asserted after production was waived by the production. This issue is left to resolution by other law.

RULE 10. SUBPOENA FOR PRODUCTION.

(a) A subpoena in a civil proceeding may require that electronically stored information be produced and that the party serving the subpoena, or person acting on the party's request, be permitted to inspect, copy, test, or sample the information.

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

(c) A party serving a subpoena requiring production of electronically stored information

shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

(d) An order of the court requiring compliance with a subpoena issued under this Rule shall protect a person who is neither a party nor a party's officer from undue burden or expense resulting from compliance.

Reporter's Notes

This rule is intended to make the process for responding to a discovery request involving electronically stored information and the process for responding to a subpoena congruent. A person responding to a subpoena for electronically stored information and parties responding to a discovery request stand on the same footing and have the same rights and obligations. A party or an attorney responsible for the issuance and service of a subpoena, however, is under a special duty to avoid imposing undue burden or expense on a person subject to the subpoena. The court shall enforce this duty whenever it is breached.

RULE 11. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing these rules, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that adopt these rules.

RULE 12. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. These rules modify, limit, and supersede the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, *et seq*., but do not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

In 2000, Congress enacted the "Electronic Signatures in Global and National Commerce Act", 106 PUB.L.NO. 229, 114 Stat. 464, 15 U.S.C. § 7001, *et seq*. (popularly known as "E-Sign"). E-Sign largely tracks the Uniform Electronic Transactions Act (UETA). Section 102 of E-Sign, entitled "Exemption to preemption", provides in pertinent part that:

> (a) A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law--
>
> (1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999 [with certain exceptions] or
>
> (2) (A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if [they meet certain criteria] and
>
> (B) if enacted or adopted after the date of the enactment of this Act, makes specific reference to this Act.

15 U.S.C. § 7002(a). The inclusion of this section is necessary to comply with the requirement that the rules "make[] specific reference to this Act" pursuant to 15 U.S.C. § 7002(a)(2)(B) if the rules contain a provision authorizing electronic records or signatures in place of writings or written signatures.

RULE 13. REPEALS. The following rules are repealed:

(1) . . . .

(2) . . . .

(3) . . . .

RULE 14. EFFECTIVE DATE. These rules take effect . . . .