DRAFT

FOR DISCUSSION ONLY

UNIFORM DISCOVERY OF ELECTRONIC RECORDS ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

WITH PREFATORY AND REPORTER'S NOTES

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September 21, 2006

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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 written pages. One gigabyte is the equivalent of 500,000 written pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes, each 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 "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

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

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 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.

Although the draft currently takes the form of a proposed statute entitled "Uniform Discovery of Electronic Records Act", the Drafting Committee has recommended to the NCCUSL Executive Committee that the draft ultimately take the form of proposed judicial rules and be re-titled "Uniform Rules Relating to the Discovery of Electronically-Stored Information".

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

UNIFORM DISCOVERY OF ELECTRONIC RECORDS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Discovery of Electronic Records Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Discovery" means the process of providing information in a civil proceeding in the courts of this State by a party or person pursuant to [insert reference to State Rules of Civil Procedure] or this [act].

(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 usable form and includes data, sound recordings, and images.

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

Reporter's Notes

The definitions of "electronic" and "electronically-stored information" are 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 term "record", is intended to be expansive and to encompass any type of information that is stored electronically.

SECTION 3. APPLICABILITY.

(a) This act applies to civil proceedings in which electronically-stored information is reasonably likely to be discoverable.

(b) This act supplements the [insert reference to state rules of civil procedure].

Reporter's Notes

These rules are intended to make the discovery of information in electronic form more efficient and less costly. They are not intended to apply to cases where discovery of electronically-stored information is not likely. Accordingly, these rules may be made applicable to a particular case by agreement of the parties or by order of the court either *sua sponte* or on motion of a party.

SECTION 4. DISCOVERY OF ELECTRONICALLY-STORED INFORMATION.

(a) A party in a civil proceeding may serve on any other party in the proceeding a request for production of electronically-stored information and for permission of the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test or sample any of the requested electronically-stored information. The request for production may ask the party on whom the request is served to convert the information into a readily usable form.

(b) A party on whom a request for production is served shall serve on the party making the request a written response not later than [30] days after the service of the request. A shorter or longer time may be ordered by the court or, in the absence of such an order, may be agreed to by the parties in writing.

(c) A response to a request for production shall state, with respect to each item or category in the request, that inspection, copying, testing or sampling of electronically-stored information will be permitted as requested unless the request is objected to, in which event, the objecting party shall state the reasons for the objection.

Reporter's Notes

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

A common example of "electronically-stored information" is e-mail. Consequently, e-mail that is relevant, or reasonably likely to lead to the discovery of admissible evidence, would be discoverable under this rule.

SECTION 5. FORM OF PRODUCTION OF ELECTRONICALLY-STORED INFORMATION.

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

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

SECTION 6. CONFERENCE CONCERNING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION; REPORT TO THE COURT.

(a) Not later than [21] days after the first defendant has filed an appearance in a civil proceeding, the parties shall hold a conference concerning whether electronically-stored

information is reasonably likely to be discoverable in the proceeding and, if so, develop a proposed plan for discovery that addresses:

(1) preservation of the information;

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

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

(4) allocation among the parties of the cost of production.

(b) Each attorney of record and each unrepresented party that has appeared in a civil proceeding is jointly responsible for arranging the conference required under subsection (a), for attempting in good faith to agree on a proposed plan, and for submitting to the court a written report not later than [14] days after the conference which summarizes the plan and specifies the issues about which the parties were unable to agree.

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. Some local Federal Rules require counsel, in advance of this sort of a conference, to review the potential production of information in electronic form with the client in order to understand how information is stored and how it can be retrieved. While this rule does not impose such an obligation, knowledge about a client's information systems is extremely important. The discussion contemplated by this rule would encompass all facets of the discovery of electronically-stored information including preservation of such information, the form and timing of production, and which party bears the costs of production. 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 Section 9.

SECTION 7. SCOPE OF DISCOVERY OF ELECTRONICALLY-STORED INFORMATION.

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

(b) On motion to compel discovery or for a protective order, the party from whom discovery of electronically-stored information is sought must show that the information is not reasonably accessible because of undue burden or cost.

(c) Even if the party from whom discovery of electronically-stored information is sought establishes that the information is not reasonably accessible because of undue burden or cost, the court may order discovery if the requesting party shows good cause. In determining whether good cause exists, the court shall consider the needs of the case, the amount in controversy, resources of the parties, the importance of the issues at stake in the litigation, and the importance of the requested discovery in resolving the issues. If the court finds good cause for discovery despite the burden or cost of accessing the information, the court may order the requesting party to bear all or part of the costs 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 cost. If the information sought by the requesting party is on sources that are accessible only by incurring undue burden or cost, 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, or reasonably likely to lead to the discovery of admissible evidence, 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 cost 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.

SECTION 8. CLAIMS OF PRIVILEGE OR PROTECTION AFTER PRODUCTION OF ELECTRONICALLY-STORED INFORMATION.

(a) If electronically-stored information is produced in discovery which is subject to a claim of privilege or 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 it.

(b) After being notified of a claim of privilege or protection under subsection (a), a party

must 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 must take reasonable steps to retrieve the information.

(c) A party receiving a notice of claim of privilege or protection may promptly present the information to the court under seal for a determination of the claim. The producing party must take reasonable steps to 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.

SECTION 9. ORDER OF COURT RELATING TO DISCOVERY OF ELECTRONICALLY- STORED INFORMATION.

(a) The court may make an order governing the discovery of electronically-stored information.

(b) An order may be made pursuant to:

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

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

(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 whom discovery of electronically-stored information is sought.

(c) An order governing the discovery of electronically-stored information may:

(1) determine whether electronically-stored information is reasonably likely to be discoverable in the case;

(2) require preservation of electronically-stored information;

(3) determine a form in which to disclose the electronically-stored information;

(4) determine the permissible scope of discovery of electronically-stored information;

(5) determine which party shall bear the cost of production;

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

(7) impose sanctions for a party's failure to disclose or preserve electronically-stored information; and

(8) address any other issue regarding discovery of electronically-stored information.

Reporter's Notes

This rule is principally intended to facilitate the court's involvement in issues relating to electronic discovery at the outset of the case. Again, 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. This rule is also intended to identify, among other matters, the subjects about which the court is authorized to govern the discovery of electronically stored information.

SECTION 10. LIMITATION ON SANCTIONS. Absent exceptional circumstances, the court may not impose sanctions on a party for failing 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 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.

Examples of this feature in present systems include programs that recycle storage media kept for brief periods against the possibility of disaster that broadly affects computer operation; automatic overwriting of information that has been deleted; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically-stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period of time. Similarly, many database programs automatically create, discard or update information without specific direction from, or awareness of, users. By protecting against sanctions for loss of information as a result of the routine operation of a computer system, this rule recognizes that such automatic features are essential to the operation of electronic information systems.

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.

In exceptional circumstances, sanctions may be imposed for loss of information even though the loss resulted from the routine, good faith operation of the electronic information system. If the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct, may be appropriate.

SECTION 11. SUBPOENA FOR PRODUCTION OF ELECTRONICALLY-STORED INFORMATION.

(a) A subpoena in a civil legal proceeding may request production of electronically-stored information and that the party serving the subpoena, or someone acting on the party's request, be permitted to inspect, copy, test or sample any electronically stored information.

(b) Subject to subsections (c) and (d), Sections 5, 7 and 8 apply to persons responding to subpoenas as if they were parties.

(c) A party serving a subpoena requesting 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 section 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.