

Rex Blackburn

From: Rex Blackburn
Sent: Thursday, February 02, 2006 9:52 AM
To: Swibel, Howard J.
Cc: 'Martha Walters'; 'bhenning@law.ua.edu'; 'John Carroll'
Subject: Discovery of Electronic Records

Howard,

As you know, the Discovery of Electronic Records Drafting Committee is scheduled for its first meeting this April, in Detroit. The Committee's Reporter, John Carroll, and I have been discussing the Agenda for this meeting. One issue that we will address at this meeting is whether the work of the Committee will eventually take the form of proposed judicial rules, or a statute.

John has identified an excellent survey of each state's rule making authority, prepared by Professor Linda S. Mullenix of the University of Texas School of Law. ("The Varieties of State Rulemaking Experience and the Consequences for Substantive and Procedural Fairness", presented at the 2005 Forum for State Appellate Court Judges, July 23, 2005. It can be found at "Recent Events" page of www.roscoepound.org.) It appears that in virtually every state, the adoption of rules governing discovery of electronic records in civil litigation would occur -- at least initially -- by judicial rulemaking, rather than legislative enactment.

This being the case, the Drafting Committee's work should likely take the form of proposed judicial rules rather than a statute. In reviewing the Conference's Record of Passage of Uniform and Model Acts I have identified only one prior instance of the Conference having adopted a body of uniform judicial rules (Rules of Evidence (1953/1974/1986/1988/1999)). (Article 1.2 of the Conference Constitution specifies that the Conference's purpose is "to promote uniformity in the law among the several States on subjects where uniformity is desirable and practicable." Although the Constitution speaks of "law" in terms of "Acts" or "legislation", the Conference's Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts implicitly characterizes judicial rules as "Acts". (Statement of Policy, Section 1.(e), "Acts may promote uniformity indirectly . . . for example, by: . . . impact on case law and teaching practices, such as the Uniform Rules of Evidence").)

Before the question of whether the Committee will be drafting judicial rules or a statute is considered by the Committee, I want notify Conference leadership of the issue, and obtain your guidance.

Rex Blackburn, Drafting Committee Chair