



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

Summary

By recent estimates, more than 90 percent of corporate and governmental information is stored in digital or electronic format. The increase in electronic storage has created significant problems for discovery in civil litigation. Discovery rules developed for a largely paper world are problematic when applied to digital and electronic storage media. The sheer volume of information in electronic form and the dynamic nature of electronic information require states to refine the rules governing discovery electronically stored information.

The Federal Civil Rules Advisory Committee revised the Federal Rules of Civil Procedure applicable to electronic information in 2006. Concurrent with the Federal committee, the Uniform Law Commission (ULC) produced the **Model Rules Relating to Discovery of Electronically Stored Information** for adoption in state court systems. The Model Rules mirror the spirit, direction and language of the Federal Rules. The Model Rules provide states with rules regarding mandatory conferences and reporting, rules governing scope and form of discovery, limitations on sanctions, rules covering claims of privilege, and rules for discovery directed at third parties. The Model Rules defer to existing state rules of civil procedure in cases where the discovery of electronically stored information is unlikely.

The Model Rules impose upon litigants the obligation to discuss electronic discovery at the outset of litigation. Parties must confer regarding the forms of production and the extent to which data is to be preserved. Since electronically stored information may exist in many forms, the mandated conference provides structure for efficient discovery. Additionally, the Model Rules encourage the courts to issue an order relating to the discovery of electronically stored information in order to facilitate orderly discovery.

Once a party receives a request for electronically stored information, the party must permit discovery of information that is relevant, not privileged, and reasonably accessible. The responding party must identify, by type or category, the sources containing potentially relevant information. If privileged information is inadvertently disclosed, the Model Rules provide procedures for a party to assert a claim of privilege after the disclosure occurs.

The Model Rules also address the difficulties that may occur in locating, retrieving and providing discoverable information. A party objecting to a production request bears the burden of showing the information is not reasonable accessible because of undue burden or expense. In congruence with the revised Federal Rules, the Model Rules do not allow for the imposition of sanctions for the loss of electronically stored information if the information was disposed of in good faith as part of routine operations. A party does however have the good faith duty to modify or suspend its routine computer operations to prevent loss of potentially discoverable information. Early communication between litigants as ordered by the Model Rules will help preserve potentially relevant information.

For further information about the Model Rules Relating to Discovery of Electronically Stored Information Act, please contact ULC Legislative Program Director Katie Robinson at (312) 450-6600 or krobinson@uniformlaws.org.