

COURTS & PROCEDURE

NCCUSL Promulgates Uniform E-Discovery Rules for State Courts

By Cecil A. Lynn III, Esq.

The National Conference of Commissioners of Uniform State Laws (“NCCUSL”), best known as the author of the Uniform Commercial Code, is in the process of drafting uniform model electronic discovery rules for adoption by the state courts.

In November 2006, the NCCUSL circulated a draft of the “Uniform Rules Relating to the Discovery of Electronically-Stored Information” (“the Uniform Rules”). The Uniform Rules are similar to the Conference of Chief Justices’ recently approved “Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information” (see *DDEE*, November 2006, p. 2).

The drafting committee is scheduled to complete the Uniform Rules in February 2007, after which they will be forwarded to the full conference of commissioners for approval this summer. “This is going to be a stand-alone package of rules that apply to e-discovery. Each of the states can adopt these rules, which are based on the Federal Rules of Civil Procedure,” said Uniform Rule Reporter and former U.S. Magistrate Judge John Carroll.

Unlike the Federal Rules of Civil Procedure (“FRCP”) which were amended on December 1, 2006 to include issues related to electronic discovery and which apply to all civil cases filed in federal courts, the Uniform Rules are only applicable to a particular case if the parties agree or if so ordered by the court. The court may implement the rules *sua sponte* or by motion of a party. The Uniform Rules are divided into 11 sections, with the first three describing the title, definitions, and applicability. The remaining sections are as follows:

Conference Concerning Discovery of Electronically-Stored Information

Similar to FRCP Rule 26(f), the Uniform Rules direct parties to meet and confer in good faith at the outset of litigation (and as additional defendants are added) concerning electronic discovery so as to develop a plan to address: (1) preservation of electronic information; (2) form in which the information will be produced; (3) time within which the information will be produced; (4) method for asserting or preserving claims of privilege and work product protection; (5) method of asserting or preserving confidential or proprietary information related to parties or non-parties; (6) and cost shifting. The Uniform Rules also require parties to discuss privilege issues that may arise during discovery and to consider the possibility of entering into non-waiver agreements.

Order of Court Relating to Discovery of Electronically-Stored Information

If the parties cannot agree on matters pertaining to electronic discovery, the Uniform Rules empower the court to get involved at the initial stages of the case to issue orders as necessary to facilitate orderly and efficient discovery.

Limitation on Sanctions

The Uniform Rules track the safe harbor provision of FRCP Rule 37(f) almost verbatim and apply to information that is lost — or destroyed — due to the normal and routine operation of a party’s computer system. Like their federal counterpart, the Uniform Rules require a showing of good faith and require that a party interrupt or suspend computer operations to prevent the destruction of information subject to a preservation obligation. However, if a party is able to demonstrate that a loss is highly prejudicial, sanctions may still be imposed even though the loss resulted from a routine, good faith operation.

Discovery of Electronically-Stored Information

The definition of “electronically-stored information” is derived from the recently amended FRCP Rule 34. The Uniform Rules authorize the production and inspection of electronically stored information and provide that the proponent party may request the responding party to convert the information into a reasonably usable format. This provision is intended to confirm that electronic data stands on equal footing with discovery of paper documents.

Form of Production of Electronically-Stored Information

Under the Uniform Rules, a party requesting production of electronic data may specify the form of production. This section is identical to FRCP Rule 34(b). The responding party may object to the requested format while stating in which format it intends to produce. If the request does not state a form of production, as under FRCP Rule 34, the responding party must produce in a form in which the electronically-stored information is ordinarily maintained or a format that is reasonably useable. A party need only produce in one format. The Uniform Rules acknowledge that different forms of production may be appropriate depending upon the types of electronically stored information.

Scope of Discovery of Electronically-Stored Information

This section mirrors FRCP 26(b)(2)(B) in that a party is not required to produce electronic data not “reasonably accessible.” Like their FRCP counterpart, the Uniform Rules do not define the phrase, instead leaving it up to court’s determination. A party seeking to prevent disclosure has the burden of proving the information is not reasonably accessible due to cost or undue burden. The court may still order the production of data that is not reasonably accessible despite the burden or cost of production if the requesting party shows good cause, but the court may order some measure of cost shifting, including having the requesting party bear all or part of the costs associated with production.

Claims of Privilege or Protection After Production of Electronically-Stored Information

The Uniform Rules set up a procedure for asserting privilege claims and for the segregation of protected materials inadvertently disclosed by a party. A party making a claim of privilege may notify the receiving party of the claim and its basis. After notification, the receiving party must sequester, return, or destroy the information pending resolution of the claim of privilege. Either party may seek judicial determination of the claimed privilege. However, as with FRCP 26(b)(5), the Uniform Rules do not address the substantive issue of waiver.

Subpoena for Production of Electronically-Stored Information

Similar to FRCP Rule 45, the Uniform Rules provide

that a civil subpoena may request electronic information and that the party serving the subpoena may inspect or test the requested data. The rule is intended to make congruous the process of responding to the discovery request and the process of responding by third parties.

While the Uniform Rules in many ways mirror the FRCP, if they are successfully implemented at the state court level, this will establish a much-needed consistency between state and federal courts dealing with the rapidly growing area of electronic discovery. This endeavor would also enable corporations to establish uniform policies and procedures that will be respected in either forum. It is a lofty goal for the NCCUSL, but one well worth the effort. Once approved, the commissioners will have the task of coordinating efforts for the adoption of the Uniform Rules in their individual states.

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SPECIAL TO IN-HOUSE COUNSEL

Buy or Build: The Impact of the New Federal Rules on the Corporate Law Department’s Management of E-Discovery (Part II)

By Jeffrey Ritter

(Part I of this series presented an overview of the internal business processes a corporate law department should consider to better manage e-discovery. See DDEE, November 2006, p. 8). Part II examines the options available to corporate law departments in selecting between e-discovery service vendors, law firms and internal staff in executing many of those e-discovery functions.)

Electronic discovery is transforming the fundamental service model through which potentially relevant and discoverable materials are being identified, preserved and produced in litigation. The essential nature of electronic discovery demands competence in understanding and navigating complex IT systems, records management, software application functions and, in many cases, digital forensic examination tech-

niques. In response, within a few short years, an entire new service sector has emerged—collectively referred to as electronic discovery service vendors (or e-discovery vendors)—which deliver services relating to electronically stored information (ESI) as potential evidence.

E-discovery vendors are diverse, including specialized firms focusing on specific capabilities as well as integrated consulting practices operating within larger global firms. Vendors can provide powerful software applications with which to review, filter and analyze ESI, as well as professional services that can contribute to the overall planning and execution of a discovery strategy. Others extend e-discovery capabilities from their existing competencies in related fields—paper record conversions, document processing,