

# Leading the News

## STATE COURT PRACTICE

### NCCUSL Approves Uniform E-Discovery Rules for State Courts at Annual Meeting

By CECIL LYNN

The National Conference of Commissioners on Uniform State Laws (NCCUSL) met in Pasadena, Calif. July 27 to August 3, and before adjourning, approved the Uniform Rules Related to Discovery of Electronically Stored Information (Uniform Rules). The Uniform Rules closely track the December 1, 2006 electronic discovery amendments to the Federal Rules of Civil Procedure.

While some states, including New Jersey, Minnesota, and Montana, have incorporated the recent Fed. R. Civ. P. amendments into their civil rules of procedure, others are taking a wait-and-see approach. As the Fed. R. Civ. P. apply only in federal courts, the Uniform Rules try to bridge the procedural gap between state and federal courts with respect to the discovery of electronic information.

"Parties who have to litigate across state boundaries will have consistency of rules regarding the preservation and production of electronically stored information," said Rex Blackburn, chair of the drafting committee. However, the Uniform Rules do not represent a one-size-fits-all approach to discovery. "The Uniform Rules give states great flexibility to pick and choose which rules fit their existing procedural mechanism," said Uniform Rule Reporter and John Carroll, former chief magistrate judge for the Middle District of Alabama.

**The Drafting Process.** The Uniform Rules went through several different drafts and the process took more than two years. Thomas Y. Allman of Mayer

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Browne & Rowe, who served as an observer to the NCCUSL, was pleased with the thought process that went into creation of the Uniform Rules. "The discussion was extremely intelligent, well thought out, and the committee dealt with the issues very well," he observed.

The final version consists of 10 sections. The first two set forth definitions and describe the applicability of the rules. The remaining sections are set forth below.

**Conference Concerning Discovery of Electronically-Stored Information.** Similar to Fed. R. Civ. P. 26(f), the Uniform Rules direct parties to meet and confer, yet recognizes that some states do not require an initial conference or disclosures between the parties. At this meeting, the parties discuss and determine whether electronic information will be sought, and if so, develop a plan to address:

- (1) preservation of electronic information;
  - (2) form in which the information will be produced;
  - (3) time within which it 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) cost shifting;
- and
- (7) any other issues related to the discovery of electronic data.

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REX BLACKBURN  
CHAIRMAN, NCCUSL DRAFTING COMMITTEE

**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 as necessary to facilitate orderly and efficient discovery.

**Limitation on Sanctions.** The final version of the Uniform Rules tracks verbatim the safe harbor provision of Fed. R. Civ. P. 37(f), which, absent exceptional circumstances, provides that court may not impose sanctions for failing to provide information that is lost or destroyed due to the routine, good-faith operation of an electronic information system.

**Request for Production.** The Uniform Rules provide that a party may serve a request for electronically stored information and seek permission to inspect, copy, test, or sample it. Any party opposing the production must serve a response that addresses each item or category of the request.

**Form of Production.** A party requesting production of electronic data may specify the form of production. This section is identical to Fed. R. Civ. P. 34(b). The responding party may object to the requested format while identifying the format in which it intends to produce. If the request does not state a form of production, as under Fed. R. Civ. P. 34, the responding party must produce the data either in the form in which it is ordinarily maintained or in a format that is reasonably useable. A party need only produce in one format.

**Scope of Discovery.** This section is akin to Fed. R. Civ. P. 26(b)(2)(B) in that a party is not required to produce electronic data not reasonably accessible because of undue expense or burden. Upon a showing of good cause, the court might still order the production, but might also allow some measure of cost shifting, including requiring the requesting party to bear part or all of the cost.

**Claim of Privilege or Protection After Production.** The Uniform Rules follow the procedure laid out in Fed. R. Civ. P. 26(b)(5) for the assertion of privilege claims and the segregation of protected materials inadvertently disclosed. A party claiming 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. Either party may seek judicial determination of the claimed privilege. Like Fed. R. Civ. P. 26(b)(5), the Uniform Rules do not address the substantive issue of waiver.

**Subpoena for Production.** Similar to Fed. R. Civ. P. 45, the Uniform Rules provide for the subpoenaing of third parties. The rule is intended to harmonize the response process of both parties and nonparties regarding requests for electronic data.

**Future.** Best known as the author of the Uniform Commercial Code, the NCCUSL will next seek the adoption of the Uniform Rules by the American Bar Association and each of the states. It is too early to tell how many states will adopt the Uniform Rules, but the NCCUSL's efforts will certainly continue to raise awareness among the state courts and quite possibly prompt more states to implement procedures for the discovery of electronically stored information.

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*Full text at <http://ddee.bna.com>, under "Proposed and Enacted Rules, Other Advisory Bodies."*

### Data Security

#### **Off-Network Data Vulnerable, According to Ponemon Survey**

**P**ersonal information residing in off-network devices is at a high risk for data breaches, but protection of such data does not receive the same level of data security attention as such information residing on networks maintained by companies and the government, according to a Elk Rapids, Mich.-based Ponemon Institute survey report released Aug. 22.

Off-network devices include mobile devices, such as laptops, personal digital assistants, personal computers, and other normally stationary devices which have been taken off the network for repair, transportation to another location or repair.

The overwhelming reasons for off-network device data breaches appears to be human error, negligence and failure to comply with data security policies, the survey report based on the answers of 735 U.S. corporate and government information technology department staffers concluded.

The survey report, which was sponsored by Columbus, Ohio-based Redemtech Technology Change Management, is available at no charge after registering at <http://www.redemtech.com/>.