

UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
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at its

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE ON UNIFORM RULES RELATING TO THE DISCOVERY
OF ELECTRONICALLY STORED INFORMATION**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in drafting these Rules consists of the following individuals:

REX BLACKBURN, 1673 W. Shoreline Dr., Suite 200, P.O. Box 7808, Boise, ID 83707,
Chair

ALBERT D. BRAULT, 101 S. Washington St., Rockville, MD 20850-2319

PAUL W. CHAIKEN, 84 Harlow St., P.O. Box 1401, Bangor, ME 04402-1401

PAUL CONDINO, S0799 House Office Bldg., P.O. Box 30014, Lansing, MI 48909-7514

CULLEN M. GODFREY, John B. Connally Bldg. 7th Flr., 301 Tarrow, College Station, TX
77840-7896

LAWRENCE R. KLEMIN, P.O. Box 955, Bismarck, ND 58502-0955

THEODORE C. KRAMER, 42 Park Pl., Brattleboro, VT 05301

STEPHEN M. ORLOFSKY, Woodland Falls Corporate Park, 210 Lake Drive E., Suite 200,
Cherry Hill, NJ 08002

ANITA RAMASASTRY, University of Washington School of Law, William H. Gates Hall,
Box 353020, Seattle, WA 98195-3020

MARK H. RAMSEY, P.O. Box 309, Claremore, OK 74018-0309

JAMES J. WHITE, University of Michigan Law School, 625 S. State St., Room 1035,
Ann Arbor, MI 48109-1215

JOHN L. CARROLL, Cumberland School of Law, Samford University, 800 Lakeshore Dr.,
Birmingham, AL 35229, *Reporter*

EX OFFICIO

HOWARD J. SWIBEL, 120 S. Riverside Plaza, Suite 1200, Chicago, IL 60606, *President*

MICHAEL B. GETTY, 430 Cove Towers Dr., #503, Naples, FL 34110, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISORS

JEFFREY ALLEN, 436 14th St., Suite 1400, Oakland, CA 94612-2716, *ABA Advisor*

SCOTT F. PARTRIDGE, 910 Louisiana St., Houston, TX 77002-4916, *ABA Section Advisor*

GEORGE LYNN PAUL, 40 N. Central Ave., Suite 1900, Phoenix, AZ 85004-4446, *ABA
Section Advisor*

KARL R. WETZEL, 1382 W. Ninth St., Suite 400, Cleveland, OH 44113, *ABA Section Advisor*

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 211 E. Ontario St., Suite 1300, Chicago, IL 60611, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

**UNIFORM RULES RELATING TO THE DISCOVERY OF
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UNIFORM RULES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

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, business or governmental entity decided that 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 that 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 is 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 these differences is the sheer volume of information in electronic form, the virtually unlimited places where the information may appear, and the dynamic nature of the information. These differences are well documented in the report of the Advisory Committee on the Federal Rules of Civil Procedure (Civil Rules Advisory Committee). The Civil Rules Advisory Committee 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 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes; each terabyte 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

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

“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 system that created it. The distinctive features of electronic discovery often increase the expense and burden of discovery.²

The Civil Rules Advisory Committee report is the work product of a six-year effort by the 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 became 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, often verbatim, 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.

The draft originally took the form of a proposed statute entitled “Uniform Discovery of Electronic Records Act”. At the request of the Drafting Committee, on November 14, 2006, the NCCUSL Executive Committee authorized that the draft 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, May 17, 2004 (revised August 3, 2004).

**UNIFORM RULES RELATING TO THE DISCOVERY OF
ELECTRONICALLY STORED INFORMATION**

RULE 1. DEFINITIONS. In these rules:

(1) “Discovery” means the process of providing information in a civil proceeding in the courts of this state pursuant to [insert reference to state rules of civil procedure] or these rules.

(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 perceivable form.

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

***Judicial Note:** The term “civil proceeding” as used in the definition of “discovery” may need to be modified in certain states to specify that it includes civil courts with differing or limited jurisdiction within the same state. As the term is used in paragraph (1), it is intended to encompass not only civil courts of general jurisdiction, but also courts of limited jurisdiction such as domestic relations and probate courts. The term is used in various rules, including Rules 3, 4, and 7.*

Comment

The definition of “electronically stored information” is intended to encompass future developments in computer technology. The rules are intended to be sufficiently broad to cover all types of computer-based information, and sufficiently flexible to encompass future technological changes and development. The term “electronically stored information” is derived from the Federal Civil Rule Amendments effective December 1, 2006, and, like its NCCUSL equivalent terms “information” and “record”, is intended to be expansive and to encompass any type of information that is stored electronically.

The term “electronically stored information” is not intended to include traditional “writings” (i.e., information stored solely on paper or another tangible, non-electronic, medium). Discovery of “writings” is the subject of existing rules of civil procedure.

RULE 2. SUPPLEMENTAL RULES OF DISCOVERY. Unless displaced by particular provisions of these rules, [insert reference to state rules of civil procedure] supplement these rules.

Comment

These Rules relate to particular issues which arise in a civil proceeding when the discovery of electronically stored information is reasonably likely to be sought. In cases where the discovery of electronically stored information is not reasonably likely to be sought, existing state rules of civil procedure govern discovery. In cases where discovery of electronically stored information is reasonably likely to be sought, existing rules of civil procedure supplement these rules to the extent that existing rules are not inconsistent with these rules.

RULE 3. CONFERENCE, PLAN, AND REPORT TO COURT.

(a) Unless the parties otherwise agree or the court otherwise orders, not later than [21] days after each responding party first appears in a civil proceeding, all parties that have appeared in the proceeding shall confer concerning whether discovery of electronically stored information is reasonably likely to be sought in the proceeding. If discovery of electronically stored information is reasonably likely to be sought, the parties at the conference shall discuss:

- (1) any issues relating to preservation of the information;
- (2) the form in which each type of the information will be produced;
- (3) the period within which the information will be produced;
- (4) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation materials, including whether such claims may be asserted after production;
- (5) the method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the proceeding;
- (6) whether allocation among the parties of the expense of production is appropriate; and
- (7) any other issue relating to discovery of the information.

(b) If discovery of electronically stored information is reasonably likely to be sought in a civil proceeding, the parties shall:

- (1) develop a proposed plan relating to discovery of the information; and
- (2) not later than [14] days after the conference under subsection (a), submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

Comment

There is nearly universal agreement that early attention to issues relating to the discovery of electronically stored information, including preservation issues, facilitates orderly discovery.

This rule creates a party initiated process for focusing that early attention.

This rule requires that in every civil proceeding the parties confer concerning whether the discovery of electronically stored information is reasonably likely to be sought. It is not necessary that the conference be face to face. If the parties conclude that the discovery of electronically stored information is not likely to be sought, this rule is not applicable and existing rules of civil procedure govern discovery unless the court otherwise orders under Rule 4 of these rules.

If the parties conclude that the discovery of electronically stored information is reasonably likely to be sought, then this rule, and the remaining rules, become applicable. This rule imposes a joint obligation on the parties to discuss issues relating to the discovery of electronically stored information at the outset of the case, and as each additional party appears in the proceeding.

Paragraph (a) of this rule requires that the parties confer after “each responding party” appears in the action. Because issues relating to electronic discovery may differ from party to party, and because all parties may not be joined before the initial required conference, the rule may require more than one conference in the action. To avoid unnecessary expense associated with additional conferences, plans and reports, to the extent that the joinder of additional parties does not affect plans or reports relating to previously joined parties, this rule should be applied by the parties and the court in a “common sense” manner that permits the parties to incorporate by reference into later plans and reports those elements of earlier plans and reports that are not affected by the joinder of additional parties.

Some states divide appearances into categories such as “general” and “special” appearances. This rule is intended to apply to parties appearing “specially” (e.g., only to contest personal jurisdiction) if discovery of electronically stored information is reasonably likely to be sought relative to issues arising from the special appearance.

In civil proceedings where this rule is applicable, the parties are required to confer on a wide variety of issues including the form or forms of production, which may include the extent to which metadata or types of embedded data, if present, are to be preserved and produced. The parties should also confer regarding the form or forms in which each type of the information is to be maintained prior to final resolution, by the court or the parties, of issues relating to the form of production.

Some local Federal Rules require counsel, in advance of this sort of a conference, to review the potential production of electronically stored information with the client in order to understand how information is stored and how it can be retrieved. While this rule does not expressly impose such an obligation, counsel’s meaningful participation in the conference and compliance with discovery obligations require that counsel promptly and diligently familiarize themselves with their clients’ information systems to the extent they may be relevant to the issues in dispute. Information systems are complex, and exhibit emergent and self-organizing properties. Often no one person will have a complete understanding of any single information system.

The conference contemplated by this rule would include discussion of all facets of the discovery of electronically stored information. 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 or to protection as trial preparation materials that may arise during the course of discovery. Because of the sheer volume of electronically stored information that may be produced, pre-production review of the information is often time consuming and expensive. Counsel may wish to explore the possibility of entering into agreements that would allow production without waiver of privilege or protection as trial preparation materials.

The rule requires the parties to develop a plan for the discovery of electronically stored information and submit a written report which summarizes the plan and states the position of each party as to any issue about which they are unable to agree. 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.

Any issues about which the parties were unable to reach agreement may be resolved by the court pursuant to Rule 4.

RULE 4. ORDER GOVERNING DISCOVERY.

(a) In a civil proceeding, the court may issue an order governing the discovery of electronically stored information pursuant to:

- (1) a motion by a party seeking discovery of the information or by a party or person from which discovery of the information is sought;
- (2) a stipulation of the parties and of any person not a party from which discovery of the information is sought; or
- (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 which discovery of the information is sought.

- (b) An order governing discovery of electronically stored information may address:
- (1) whether discovery of the information is reasonably likely to be sought in the proceeding;
 - (2) preservation of the information;
 - (3) the form in which each type of the information is to be produced;
 - (4) the time within which the information is to be produced;
 - (5) the permissible scope of discovery of the information;

- (6) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;
- (7) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;
- (8) allocation of the expense of production; and
- (9) any other issue relating to discovery of the information.

Comment

Although this rule does not expressly require the court to issue an order relating to discovery of electronically stored information, courts are strongly encouraged to do so. Early intervention by the court may facilitate orderly discovery of such information and avoid difficulties later in the case.

The rule permits the court to issue an order relating to discovery of electronically stored information pursuant to motion of a party, stipulation of the parties, or on the court's own motion but only after providing the parties notice and an opportunity to be heard.

RULE 5. LIMITATION ON SANCTIONS. Absent exceptional circumstances, the court may not impose sanctions on a party under these rules for failure to provide electronically stored information lost as the result of the routine, good-faith operation of an electronic information system.

Comment

This rule is identical to its Federal Rule equivalent, Federal Rule 37(f). As noted in the comments to Federal Rule 37(f), the 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.

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.

This rule restricts the imposition of sanctions. It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

RULE 6. REQUEST FOR PRODUCTION.

(a) In a civil proceeding, a party may serve on any other party a request for production of electronically stored information and for permission to inspect, copy, test, or sample the information.

(b) A party on which a request to produce electronically stored information is served shall serve a response on the requesting party in a timely manner. The response must state, with respect to each item or category in the request:

(1) that inspection, copying, testing, or sampling of the information will be permitted as requested; or

(2) any objection to the request and the reasons for the objection.

Comment

This rule is intended to establish that the discovery of information in electronic form stands on an equal footing with discovery of paper documents. The phrase in Rule 6(b) “in a timely manner” is intended to incorporate the time limitations set by individual state rules for responding to a request for production.

RULE 7. FORM OF PRODUCTION.

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

(b) If a party responding to a request for production of electronically stored information objects to a specified form for producing the information, or if a form is not specified in the request, the responding party shall state in its response the form in which it intends to produce each type of the 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 a type of 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.

Comment

The form of production is more important to the exchange of electronically stored information than it is to the exchange of paper documents. The rule recognizes that electronically stored information may exist in multiple forms, and 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 or forms and allows the responding party to object, and creates a default rule for production if no form is specified.

RULE 8. LIMITATIONS ON DISCOVERY.

(a) A party may object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection the party shall identify the reason for the undue burden or expense.

(b) On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party objecting to discovery under subsection (a) bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.

(c) The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(d) If the court orders discovery of electronically stored information under subsection (c) it may set conditions for discovery of the information, including allocation of the expense of discovery.

(e) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:

(1) it is possible to obtain the information from some other source that is more

convenient, less burdensome, or less expensive;

(2) the discovery sought is unreasonably cumulative or duplicative;

(3) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(4) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

Comment

This rule is designed to address the unique issues raised by the difficulties in locating, retrieving and providing discovery of electronically stored information. Information that is from sources that are reasonably accessible is subject to discovery without intervention of the court, subject to the limitations generally applicable to discovery under the state's existing discovery rules. Discovery of electronically stored information that is from sources that are reasonably accessible is also subject to the limitation imposed by subsection (e) of this rule.

Discovery of electronically stored information that is from sources that are not reasonably accessible is required, over objection, only upon a showing pursuant to subsection (c). The decision whether to require the responding party to search for and produce information that is from sources that are not reasonably accessible depends not only on the burden and expense of doing so but also on whether the burden and expense can be justified in the circumstances of one case. Appropriate considerations may include: (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 from 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 discovery. If the court orders discovery, the court may allocate to the requesting party the expense, in whole or in part, of discovery.

Under this rule, a responding party should permit discovery of electronically stored information that is relevant, not privileged and reasonably accessible. The responding party must also identify, by category or type, the sources containing potentially responsive information that the responding party is neither searching nor permitting discovery of on the ground it is not reasonably accessible. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burden and expense of providing discovery and the likelihood of finding responsive information from 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.

RULE 9. CLAIM OF PRIVILEGE OR PROTECTION AFTER PRODUCTION.

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

(b) After being notified of a claim of privilege or of protection under subsection (a), a party shall immediately sequester the specified information and any copies it has and:

(1) return or destroy the information and all copies and not use or disclose the information until the claim is resolved; or

(2) present the information to the court under seal for a determination of the claim and not otherwise use or disclose the information until the claim is resolved.

(c) If a party that received notice under subsection (b) disclosed the information subject to the notice before being notified, the party shall take reasonable steps to retrieve the information.

Comment

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 or ethical implications of use of such data. These issues are left to resolution by other law or authority.

RULE 10. SUBPOENA FOR PRODUCTION.

(a) A subpoena in a civil proceeding may require that electronically stored information be produced and that the party serving the subpoena or a person acting on the party's request be permitted to inspect, copy, test, or sample the information.

(b) Subject to subsections (c) and (d), Rules 7, 8, and 9 apply to a person responding to a subpoena under subsection (a) as if that person were a party.

(c) A party serving a subpoena requiring 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 rule must provide protection to a person that is not a party from undue burden or expense resulting from compliance.

Comment

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. This rule is not intended to supplant protections under the state's existing rules governing discovery afforded to a person responding to a subpoena. 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 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.

This rule protects a person responding to a subpoena for production of electronically stored information from undue burden or expense resulting from compliance with the subpoena. In determining whether there is undue burden or expense, the court may consider, among other factors, the existence of any relationship between such person and a party to the civil proceeding.