

## **Explanatory Comment - Electronically Stored Information**

### **A. No Importation of Federal Law**

Though the term “electronically stored information” is used in these rules, there is no intent to incorporate the federal jurisprudence surrounding the discovery of electronically stored information. The treatment of such issues is to be determined by traditional principles of proportionality under Pennsylvania law as discussed in further detail below.

### **B. Proportionality Standard**

As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination and resolution of litigation disputes. The proportionality standard requires the court, within the framework of the purpose of discovery of giving each party the opportunity to prepare its case, to consider: (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) the relevance of electronically stored information and its importance to the court’s adjudication in the given case; (iii) the cost, burden, and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; and (v) any other factors relevant under the circumstances.

### **C. Tools for Addressing Electronically Stored Information**

Parties and courts may consider tools such as electronic searching, sampling, cost sharing, and non-waiver agreements to fairly allocate discovery burdens and costs. When utilizing non-waiver agreements, parties may wish to incorporate those

agreements into court orders to maximize protection vis-à-vis third parties. See, e.g., Fed. R. Evid. 502(c).

D. Eliminating References to “Depositions”

The elimination of specific references to “depositions” in Rule 4011 is not intended to exclude depositions from the scope of this rule. The reference was eliminated because there was no reason to call out this one form of traditional discovery among many.

By the Civil Procedural  
Rules Committee

Diane W. Perer  
Chair