

## eData lawflash

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## Pennsylvania Proclaims eDiscovery Independence from Federal Model

*State Supreme Court adopts new eDiscovery rules similar to federal rules, but specifically rejects federal jurisprudence.*

Following the example set by Pennsylvanians 236 years ago, the Pennsylvania Supreme Court has declared its independence—adopting new rules relating to electronic discovery<sup>1</sup> while expressly rejecting the Federal Rules of Civil Procedure (FRCP) and related jurisprudence as applied to electronic discovery.

### Similarities to FRCP

The new Pennsylvania state rules of civil procedure regarding discovery of “electronically stored information” (ESI) are similar to their federal counterparts. Both allow for discovery of ESI and rely on principles of proportionality to limit the burden eDiscovery can impose on responding parties.

For example, Pennsylvania Rule 4009.1 allows for the request and production of ESI; provides that parties may specify the format of production; and, if no format is requested, requires that the production be made in the form in which the ESI was typically maintained, using language almost identical to that of FRCP Rule 34(b).

Similarly, in a comment to Rule 4009.11, the Pennsylvania Supreme Court outlines its proportionality standard. This standard requires courts to take the following into account when making discovery rulings: the “nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; the relevance of ESI and its importance to the adjudication of a case; the cost, burden, and delay that may be imposed on the parties; and any other relevant factors.” These factors have also been delineated almost verbatim in federal eDiscovery jurisprudence.

### Differences from FRCP

Despite these similarities, the Pennsylvania Supreme Court is keen to distinguish its rules from those of the FRCP. Indeed, in its comments to the new rules, the state Civil Procedural Rules Committee (the Committee) explicitly rejected the wholesale incorporation of the FRCP, stating that the changes to the state rules were “not pursuant to the Federal Rules of Civil Procedure and the frequently intricate case law developing in the federal courts.” For that reason, although the two sets of rules may be similar, they may end up being applied very differently.

Judge R. Stanton Wettick, Jr. of the Allegheny County Court of Common Pleas, who led the committee drafting the rule changes, stated that the new Pennsylvania rules emphasize the proportionality standard and avoid eDiscovery complexities. Specifically, the Committee rejected the meet-and-confer requirement of FRCP Rule 26(f). According to Judge Wettick, those conferences force parties to confront issues early on that may not even emerge absent that conference.

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1. The Proposed Rule Amendments can be found at <http://www.law.com/image/pa/charts/249.pdf>.

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At the same time, there is nothing in the new Pennsylvania rules that prohibits the parties from meeting to discuss discovery issues. Even absent specific requirements to do so, it is beneficial to reach early agreement on potential eDiscovery issues rather than deal with issues as they arise on an ad hoc basis. Proactive discussion and agreement between the parties on the scope and conduct of discovery can minimize or eliminate disputes further down the road and can dramatically reduce discovery costs in larger, more complex cases. In fact, the commentary to the new Pennsylvania rules encourages each court to work with the parties to resolve issues as they emerge in the least burdensome way possible, based on the specific needs of each case. In addition, courts are free to adopt the standards of the FCRP when it makes sense to do so, and are free to develop their own eDiscovery case law.

## Implications

The plan outlined under the new Pennsylvania eDiscovery rules “to cross each eDiscovery bridge as it comes” with no guidance from existing federal jurisprudence may lead to a great deal of uncertainty until the state courts address issues long since settled under federal discovery law. For now, litigants will go into a case less certain of how the discovery process will play out. While the adoption of these rules ushers in the age of eDiscovery in Pennsylvania, it will be essential for companies to factor the present uncertainty of eDiscovery in Pennsylvania into both their budgets and their litigation strategies.

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