

**SUPREME COURT OF PENNSYLVANIA
CIVIL PROCEDURAL RULES COMMITTEE**

Proposed Recommendation No. 249

**Proposed Amendment of Rules 4009.1, 4009.11, 4009.12,
4009.21, 4009.23, and 4011 Governing Discovery of
Electronically Stored Information with Explanatory Comment**

While the Civil Procedural Rules Committee proposes that Rules of Civil Procedure 4009.1, 4009.11, 4009.12, 4009.21, 4009.23, and 4011 be amended as set forth herein, the core of the proposal is an explanatory comment, which provides that the discovery of electronically stored information will be governed by the same considerations that govern other discovery. The purpose of the comment is to provide guidance to the trial judge and counsel so that discovery disputes regarding electronically stored information are resolved pursuant to the general principles of Rule 4011, and not pursuant to the Federal Rules of Civil Procedure and the frequently intricate case law developing in the federal courts. In addition, the explanatory comment provides guidance in the form of considerations and potential tools for resolution of questions relating to such discovery to assist both the trial courts and counsel.

The proposed recommendation is being submitted to the bench and bar for comments and suggestions prior to its submission to the Supreme Court of Pennsylvania. All communications in reference to the proposed recommendation should be sent no later than **February 18, 2011** to:

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Rule 4009.1. Production of Documents and Things. General Provisions

(a) Any party may serve a request upon a party pursuant to Rules 4009.11 and 4009.12 or a subpoena upon a person not a party pursuant to Rules 4009.21 through 4009.27 to produce and permit the requesting party, or someone acting on the party's behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, **[electronically created data, and other compilations of data from which information can be obtained, translated, if necessary, by the respondent party or person upon whom the request or subpoena is served through detection or recovery devices into reasonably usable form)]** **and electronically stored information**, or to inspect, copy, test or sample any tangible things **or electronically stored information**, which constitute or contain matters within the scope of Rules 4003.1 through 4003.6 inclusive and which are in the possession, custody or control of the party or person upon whom the request or subpoena is served; and may do so one or more times.

(b) **A party requesting electronically stored information may specify the format in which it is to be produced and a responding party or person not a party may object. If no format is specified by the requesting party, electronically stored information may be produced in the form in which it is ordinarily maintained or in a reasonably usable form.**

Note * * *

Rule 4009.11. Request Upon a Party for Production of Documents and Things

(a) The request may be served without leave of court upon the plaintiff after commencement of the action and upon any other party with or after service of the original process upon that party.

(b) The request shall set forth in numbered paragraphs the items to be produced either by individual item or by category, and describe each item or category with reasonable particularity. Each paragraph shall seek only a single item or a single category of items. The request shall be prepared in such fashion that sufficient space is provided immediately after each paragraph for insertion of the answer.

Note: A request seeking electronically stored information should be as specific as possible. Limitations as to time and scope are favored, as are agreements between the parties on production formats and other issues.

See also Rule 4009.1 generally regarding electronically stored information.

Rule 4009.12. Answer to Request Upon a Party for Production of Documents and Things

- (a) * * *
- (b) * * *
- (c) * * *
- (d) * * *

Note: See Rule 4009.1 regarding electronically stored information.

Rule 4009.21. Subpoena Upon a Person Not a Party for Production of Documents and Things. Prior Notice. Objections

- (a) * * *
- (b) * * *
- (c) * * *
- (d) * * *

Note: Rule 4009.22(a) requires the filing of a certificate as a prerequisite to service.

See Rule 4009.1 regarding electronically stored information.

Rule 4009.23. Certificate of Compliance by a Person Not a Party. Notice of Documents or Things Received

- (a) * * *
- (b) * * *

Note: See Rule 4009.1 regarding electronically stored information.

Rule 4011. Limitation of Scope of Discovery [and Deposition]

No discovery [or deposition], including discovery of electronically stored information shall be permitted which

- (a) is sought in bad faith;
- (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party;
- (c) is beyond the scope of discovery as set forth in Rules 4003.1 through 4003.6;
- (d) is prohibited by any law barring disclosure of mediation communications and mediation documents; or

Note: Section 5949 of the Judicial Code, 43 Pa.C.S. § 5949, provides, with specified exceptions, that all mediation communications and mediation documents are privileged. See Section 5949(c) for definitions of mediation communication and mediation document.

- (e) would require the making of an unreasonable investigation by the deponent or any party or witness.

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.