New Arizona E-Discovery Rules

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Today, almost all the important facts of a case begin as keystrokes on a computer. The implication for lawyers and litigants is obvious—overlook electronic evidence and you will likely fail to uncover critical facts about your case.

Recently, Arizona became the latest state to recognize the prevalence of electronic information and the need for discovery rules to better accommodate such information. On Jan. 1, 2008, changes to the Arizona Rules of Civil Procedure on e-discovery went into effect. The rules clarify that "electronically stored information" is discoverable and provide guidance to litigants and courts on a number of issues that may arise in conducting discovery of electronically stored information.

Those who are already familiar with the 2006 e-discovery amendments to the Federal Rules of Civil Procedure will immediately recognize the similarities in the Arizona Rules of Civil Procedure. The Arizona rules have historically incorporated most of the provisions of the federal rules, and there has been a conscious effort to maintain this uniformity.[1] And the recent Arizona amendments are modeled on and for the most part adopt the recent changes to the federal rules, which became effective on Dec. 1, 2006. There are, however, some important differences.

First, the similarities.

What's the Same? Rule 16 Conferences

Like its federal counterpart, Rule 16(b) was amended to clarify that a court has the authority to enter orders governing the disclosure and discovery of electronically stored information, the preservation of discoverable documents and electronically stored information, and the enforcement of party agreements for asserting claims of attorney–client privilege or work-product protection after production.[2]

The common thread running through both the amendments to Rule 16 and the State Bar Committee Note[3] is that electronic discovery must be handled cost effectively, particularly in smaller state court cases. Ideally, this happens through careful planning, collegial communication between opposing counsel, and agreements on how to handle such discovery. However, the amendments clarify that courts have the authority to impose sensible limits on e-discovery when necessary. Though this was certainly the case before the amendments, the shear volume of electronic information makes it even more imperative that lawyers and litigants work together to manage electronic discovery, with the court available and willing to resolve disputes as a last resort.

Changes to Rules 33, 34 and 45

Like the federal rules, the recent Arizona amendments highlight that "electronically stored information" is discoverable from both litigants and third parties, and, for the first time, expressly provide that such information may be required to be produced in electronic form.

In their amended form, Rules 34(a) and 45(a) distinguish between "electronically stored information" and "documents," and provide that a party may obtain discovery of both categories. The amendments also contain a number of other conforming changes, such as the modification of Rule 33(c) to reflect that the option to produce business records in response to an interrogatory includes the option to produce "electronically stored information."

Although the rules treat "documents" and "electronically stored information" as separate categories subject to discovery, discoverable information often will fall into both categories. In light of this overlap (and the fact that since 1970 the federal rules have defined "documents" to include "data compilations" stored in electronic media), the Advisory Committee Notes to the federal rules state, "A Rule 34 request for production of 'documents' should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and 'documents.'"[4] In other words, as long as you request "documents," you are entitled to all responsive electronic information as well. Although this comment does not accompany the Arizona rules, it would be advisable for responding parties in state court actions to heed this admonition and avoid an overly technical distinction between "documents" and "electronically stored information."

Like their federal counterparts, Rules 34(a) and 45(a) also were amended to provide that a party may seek to "test or sample" electronically stored information. This could be important, for example, where a party seeks to gain direct access to an opponent's computer system to determine whether confidential or other trade secret

information is contained on, or has been deleted from, a computer. Though such "testing" will likely be rare, the rules now specifically authorize it. Likewise, the ability to "sample" electronic information may come into play when a party must determine whether a large store of data, such as back-up tapes, contains relevant information. Before seeking full-scale discovery, a subset of the data can be sampled to determine if relevant information is likely to appear in the larger set. Such sampling is a well-entrenched practice under the federal rules.[5]

Also like its federal counterpart, Rule 34(b) sets forth a process for determining the form in which electronic records must be produced. Because disputes sometimes arise over the form of production, Rule 34(b) permits the requesting party to specify the form or forms of production. Possible formats include hard-copy only, "native" format, or TIFF, PDF or some other "static" image format (where a document is produced and displayed much as it would appear when it is retrieved from a printer). For example, where metadata may be relevant, a party may seek to receive electronic records in their "native" format.[6]

However, because there are a number of legitimate objections that could be made to native production—such as the ease with which native files can be altered, the inability to redact privileged information, the potential disclosure of privileged information, and the difficulty of attaching "Bates" numbers and "confidentiality" designations to native files—a responding party may choose to object to the wholesale production of documents in native form.[7]

Once a request for a form of production is received, Rule 34(b) requires the responding party to comply with the request unless it objects, in which case it must state the basis for its objection and the form or forms it intends to produce. The court will resolve any objections that cannot be resolved by the parties. If no form of production is specified, the responding party must state the form it intends to use and must produce records either in the form in which they are "ordinarily maintained" or a "reasonably usable" form. Rule 34(b) also states that a party need not produce electronic records in more than one form.

Inaccessible Information

Another innovation of the federal rules that has been adopted in Arizona relates to the discovery of electronic information that is difficult or costly to retrieve and process for use in litigation. For example, back-up tapes—designed to preserve data that may otherwise be lost in a disaster or other emergency—often require expensive restoration before data may be retrieved in a usable form. Must a party produce such data? If so, who should pay for their production? The new rules provide some answers.

Under amended Rule 26(b)(1)(B), a party need not provide discovery of electronically stored information from sources that the party identifies as "not reasonably accessible because of undue burden or expense." If challenged in a motion to compel, the producing party bears the burden of making this showing. If such a showing is made, the requesting party may nonetheless obtain the records if it demonstrates "good cause." If good cause is shown, the rule authorizes the court to "specify conditions for the discovery," such as shifting discovery costs to the requesting party.[8]

"Safe Harbor"

Another change appears in amended Rule 37(g), which limits a court's power to impose sanctions for failing to provide electronically stored information, but only if its loss resulted from "the routine, good-faith operation of an electronic information system." As noted in the Advisory Committee Notes to Federal Rule 37(f), many computer operations involve the routine alteration or destruction of information that attends ordinary use, often without the operator's specific direction or awareness. Rule 37(g), often referred to as a "safe harbor" provision, provides that "absent exceptional circumstances," such routine, good-faith destruction of evidence should not result in discovery sanctions.

Although Rule 37(g) leaves many questions unanswered (such as the meaning of "routine" and "good faith"), it is likely that courts in Arizona will look to federal case law, as well as the Advisory Committee Notes associated with the federal rule amendment, for guidance. One thing both the Advisory Committee and several federal cases have already made clear is that when a party is under a duty to preserve information because of pending or reasonably anticipated litigation, a party will not qualify for Rule 37(g)'s "safe harbor" if it fails to implement a "litigation hold" or suspend its routine document destruction practices.[9]

Asserting Privilege

An additional change in both the federal and Arizona rules relates to the post-production assertion of the attorney–client privilege or work-product doctrine. Arizona Rule 26.1(f)(2), which incorporates the amendment to Federal Rule 26(b)(5), creates a procedure for retrieving inadvertently produced privileged information until a court rules on whether the privilege has been waived. Similarly, an amendment to Rule 45(d)(2)(B) makes this procedure applicable to assertions of inadvertent production by a person responding to a subpoena.

Under the amended rules, a party (or a person responding to a subpoena) may notify the recipient that privileged information has been inadvertently produced. Once notified, the receiving party must "promptly return, sequester, or destroy" the specified information and any copies it has made. As an alternative, the receiving party may "promptly present the information to the court under seal for a determination of the claim." However, other than presenting the information to the court, the rule admonishes the receiving party not to "use or disclose" the information until the claim is resolved. Furthermore, if the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The rule is not limited to claims of privilege for electronically stored information, but applies to all discoverable information.

The State Bar Committee Note states that Rule 26.1(f)(2), like its federal counterpart, was intended merely to place a "hold" on further use or dissemination of an inadvertently produced document that is subject to a claim of privilege. The note also emphasizes that the amendment does not address

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the substantive matter of "whether the privilege or protection that is asserted after production was waived by the production."[10]

What's Different?

One of the most notable and potentially problematic differences is the lack of any provision under the state rules directing the parties to address electronic discovery issues early in a case and, if necessary, to get such issues resolved promptly by a court. Another related difference is the obligation under Rule 26.1 to disclose electronically stored information, and the lack of any requirement that the parties confer about electronic discovery matters, including the form of production and relative accessibility of the information, before disclosing such information under Rule 26.1.

As the State Bar's comments on the proposed amendments noted, a key component of the federal rule amendments is the requirement in Federal Rule 26(f) that the parties discuss electronic discovery issues at the outset of a case, and that the court resolve any differences between the parties at the Rule 16(b) scheduling conference, which usually takes place before any substantial discovery occurs. The State Bar noted that the Arizona rules have no similar counterpart, and that Rule 16(b) conferences in state court often come much later in a case than do Federal Rule 16 scheduling conferences. Among the concerns raised by the Bar was that a party may attempt to take advantage of Rule 26.1's disclosure requirement by producing its electronic records before conferring with the other parties about the format in which those records should be produced, which may lead to disputes if the chosen format is different from what the receiving party prefers.

To address these concerns, the State Bar proposed an amendment to Rule 26.1 that would have directed the parties to confer about various electronic discovery matters if a party identifies electronic information in its disclosure statement. The Bar also proposed a change to Rule 26.1 to clarify that while a party must disclose the existence of electronically stored information that it contends is "not reasonably accessible," it need not make it available for inspection or copying unless required to do so under Rule 26(b)(1)(B), which sets forth a procedure for resolving such claims.

The Supreme Court did not agree to these changes. Instead, Rule 26.1 was modified only to specify that "electronically stored information" must be disclosed to the same extent as other "documents." Because Arizona's disclosure obligation under Rule 26.1 is far broader than under the federal rules, this means that parties likely will face considerably greater difficulty and expense in complying with the obligation to disclose electronic information in state court actions. However, the Court did ameliorate this burden somewhat by accepting the Bar's proposal to amend Rule 26(b)(1)(B) regarding the treatment of electronic records that a party claims are not "reasonably accessible." Now Rule 26(b)(1)(B)'s procedure for resolving claims of inaccessibility governs requests made under Rule 34 and disclosures under Rule 26.1. Thus, a party may disclose, in general terms, the existence of electronically stored information that it believes is not "reasonably accessible" but need not make the information available for inspection or copying unless a court rejects its claim of inaccessibility or determines that "good cause" exists for its production.

Further ameliorating the Bar's concerns is that Rule 16(b) and Rule 26.1 provide considerable flexibility in handling the disclosure and discovery of electronic information. Thus, in appropriate cases, the parties should confer about issues such as the form of production and the preservation and relative accessibility of electronic information well before making their initial disclosures under Rule 26.1, and seek resolution by the court of any disputes over these issues (such as the form of production for disclosures) pursuant to Rule 16(b).

In addition, although Rule 26.1 anticipates that "copies" of documents and electronically stored information will be produced with a party's initial disclosures, the rule permits a delay in such production for "good cause." In light of the need to confer about what electronically stored information exists, whether it should be preserved, how it will be searched and produced, the format in which it will be produced, and a timetable for production, "good cause" will almost certainly be found where electronic information is identified in a party's disclosure statement.

endnotes

1. Daniel J. McAuliffe & Shirley J. Wahl, 2 Ariz. Prac., Civil Trial Practice § 2.4 (2d ed. 2006); *Edwards v. Young*, 107 Ariz. 283, 284 (1971); *Byers-Watts v. Parker*, 199 Ariz. 466, 469 (Ct. App. 2001).
2. The recent amendments also make changes to Rules 16(c) and 16.3, which pertain to comprehensive pretrial conferences in medical malpractice cases and cases assigned to the complex civil litigation program, respectively. Like Rule 16(b), these rules were amended to permit the court to address the disclosure and discovery of electronically stored information and party agreements relating to the assertion of post-production claims of privilege or work-product protection.
3. The State Bar Committee Note accompanying the 2008 amendments to Rule 16 states that because these issues typically arise at the outset of a case, a court need not wait until the parties are ready to discuss other issues under Rule 16(b) before holding a hearing on these and related subjects. The note also emphasizes that a court has the authority under Rule 16 to limit or impose conditions on the disclosure or discovery of electronic information, and may consider a number of factors in determining what course of action to take. State Bar Committee Note, Rule 16(b), Ariz.R.Civ.P.
4. Advisory Committee Note, 2006 Amendments to Rule 34, Fed.R. Civ.P.
5. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (D.N.Y. 2003) (authorizing sampling of back-up tapes); *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (same and stating that the "more likely it is that the [sample] backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense").
6. A "native" file typically includes the file's "metadata," which includes information about the document (such as author, creation and last date of modification), and may reveal earlier versions of the document, embedded comments, and other information that is not apparent in a static image format.
7. For cases addressing production in native format, *see Michigan First Credit Union v. Cumis Ins. Soc'y, Inc.*, No. 05-74423, 2007 U.S. Dist. LEXIS 84842 (D. Mich. Nov. 16, 2007); *Wyeth v. Impax Labs., Inc.*, No. 06-222-JJF, 2006 U.S. Dist. LEXIS 79761 (D. Del. Oct. 26, 2006); *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 646-654 (D. Kan. 2005).
8. An amendment was also proposed to Arizona Rule 45(d), which would have extended these same protections to a person responding to a subpoena. The Arizona Supreme Court rejected this.
9. Advisory Committee Note, 2006 Amendments to Rule 37(f), Fed.R.Civ.P. *See also Peskoff v. Faber*, 244 F.R.D. 54, 61 (D.D.C. 2007); *Disability Rights Council v. Washington Metro. Transit Auth.*, 242 F.R.D. 139, 146 (D.D.C. 2007).
10. State Bar Committee Note, Rule 26.1(f), Ariz.R.Civ.P.