Supreme Court
STATE OF ARIZONA

RACHELLE M. RESNICK
CLERK OF THE COURT

402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON STREET
PHOENIX, ARIZONA 85007-3231

TELEPHONE: (602) 452-3396

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

September 6, 2007

RE: RULES 16, 26, et al, ARIZ. RULES OF CIVIL PROC.
Arizona Supreme Court No. R-06-0034

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on August 27, 2007, in regard to the above-referenced cause:

ORDERED: [Petition to Amend Rules 16, 26, 26.1, 33, 34, 37, and 45, Arizona Rules of Civil Procedure] = ADOPTED as modified, effective January 1, 2008.

Rachelle M Resnick, Clerk

TO:
George L Paul, Lewis and Roca LLP
John H Messing
Robert B Van Wyck, Chief Counsel, State Bar of Arizona
Ken Withers
Tom Allman, Mayer, Brown, Rowe & Maw LLP
Final Rule Distribution List
cf

IN THE SUPREME COURT OF THE STATE OF ARIZONA

Supreme Court No. R-06-0034

FILED

SEP 0 5 2007

RACHELLE M. HEUNICK
CLERK SUPREME COURT
BY

ORDER AMENDING
RULES 16(b), 16(c), 16.3, 26(b), 26.1, 26.2, 33(c), 34, 37(g), and 45,
ARIZONA RULES OF CIVIL PROCEDURE,

IT IS ORDERED that Rules 16(b), 16(c), 16.3, 26(b), 26.1, 26.2, 33(c), 34, 37(g), and 45, Arizona Rules of Civil Procedure, be amended in accordance with the attachment hereto,* to be effective as of January 1, 2008.

DATED in the City of Phoenix, Arizona at the Arizona Courts Building, this 5th day of September, 2007.

For the Court:

Ruth V. McGregor

RUTH V. McGREGOR
Chief Justice

* Changes or additions in text are indicated by underscoring and deletions from text are indicated by ~~strikeouts~~.

ARIZONA RULES OF CIVIL PROCEDURE

* * *

Rule 16(b). Scheduling and Subjects to Be Discussed at Comprehensive Pretrial Conference in Non-Medical Malpractice Cases

Except in medical malpractice cases, upon written request of any party the court shall, or upon its own motion the court may, schedule a comprehensive pretrial conference. At any comprehensive pretrial conference under this rule, except for conferences conducted in medical malpractice cases, the court may:

(1) Determine the additional disclosures, discovery and related activities to be undertaken and a schedule therefor.

(A) The schedule shall include depositions to be taken and the time for taking same; production of documents or electronically stored information; non-uniform interrogatories; admissions; inspections or physical or mental examinations; and any other discovery pursuant to these rules.

(B) Among other orders the court may enter under this rule, the court may enter orders addressing one or more of the following:

(i) setting forth any requirements or limitations for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced;

(ii) setting forth any measures the parties must take to preserve discoverable documents or electronically stored information; and

(iii) adopting any agreements the parties reach for asserting claims of privilege or of protection as to trial preparation materials after production.

(2)-(19) [No change in text.]

State Bar Committee Note
2008 Amendment

Rule 16(b) was amended to clarify that a court has the power under Rule 16 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 regarding post-production assertions of privilege or work product protection. Because these issues typically arise at the beginning of a case, a court need not wait until the parties are ready to address other issues under Rule 16(b) before holding a hearing under this Rule on these and related subjects.

Orders regarding the disclosure or discovery of electronically stored information may specify

the forms and manner in which such information shall be produced. The court also may enter orders limiting (or imposing conditions upon) the disclosure of such information, and may take into account the relative accessibility of the electronically stored information at issue, the costs and burdens on parties in making such information available, the probative value of such information, and the amount of damages (or the type of relief) at issue in the case. See CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 5 (approved August 2006) (noting that in determining discovery issues relating to electronically stored information, a court should consider these factors, among others).

Document retention and preservation issues are especially likely to arise with electronically stored information because the "ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information." Fed. R. Civ. P. 26(f), Advisory Committee Notes on 2006 Amendment. A court has the power under this Rule to incorporate into an order any agreement the parties might reach regarding preservation issues or, absent an agreement, to enter an order in appropriate circumstances imposing such requirements and limitations. In considering such an order, a court should take into account not only the need to preserve potentially relevant evidence, but also any adverse effects such an order may have on a party's on-going activities and computer operations. A preservation order entered over objections should be narrowly tailored to address specific evidentiary needs in a case, and ex parte preservation orders should issue only in exceptional circumstances. Cf. id. (stating that preservation orders should be narrowly tailored where objections are made and cautioning against "blanket" or ex parte preservation orders); CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 10 (approved August 2006) ("When issuing an order to preserve electronically stored information, a judge should carefully tailor the order so that it is no broader than necessary to safeguard the information in question.").

If the amount of documents and electronic data to be disclosed is voluminous, an agreement among the parties minimizing the risks associated with the inadvertent production of privileged or otherwise protected material may be helpful in lessening discovery costs and expediting the litigation. As with its counterpart in the Federal Rules of Civil Procedure, this Rule does not provide the court with authority to enter such an order without party agreement, or limit the court's authority to act on motions to resolve privilege issues. Cf. Fed. R. Civ. P. 16(b), Advisory Committee Notes on 2006 Amendment (clarifying the rule's scope).

Rule 16(c). Scheduling and Subject Matter at Comprehensive Pretrial Conferences in Medical Malpractice Cases

In medical malpractice cases, within five days of receiving answers or motions from all defendants who have been served, plaintiff shall notify the court to whom the case has been assigned so that a comprehensive pretrial conference can be set. Within 60 days of receiving the notice, the court shall conduct a comprehensive pretrial conference. At that conference, the court and the parties shall:

(1) Determine the discovery to be undertaken and a schedule therefor. The

schedule shall include the depositions to be taken, any medical examination which defendant desires to be made of plaintiff and what additional documents, electronically stored information, and other materials are to be exchanged. Only those depositions specifically authorized in the comprehensive pretrial conference shall be allowed except upon stipulation of the parties or upon motion and a showing of good cause. The court, upon request of any defendant, shall require an authorization to allow the parties to obtain copies of records previously produced under Rule 26.2(A)(2) of these Rules or records ordered to be produced by the court. If records are obtained pursuant to such authorization, the party obtaining the records shall furnish complete copies to all other parties at the sole expense of the party obtaining the records.

(2)-(13) [No change in text.]

* * *

Rule 16.3. Initial Case Management Conference in Cases Assigned to the Complex Civil Litigation Program

(a) Subjects for Consideration. Once a case is determined to be a complex civil case, an initial case management conference with all parties represented shall be conducted at the earliest practical date, and a Case Management Order issued by the court promptly thereafter. Among the subjects that should be considered at such a conference are:

(1)-(6) [No change in text.]

(7) Any requirements or limitations for the disclosure or discovery of electronically stored information, including the form or forms in which the electronically stored information should be produced;

(8) Any measures the parties must take to preserve discoverable documents or electronically stored information;

(9) Any agreements reached by the parties for asserting claims of privilege or of protection as to trial-preparation materials after production;

(10~~7~~) [No change in text.]

(11~~8~~) [No change in text.]

(12~~9~~) [No change in text.]

(13~~0~~) [No change in text.]

(14~~1~~) [No change in text.]

(15~~2~~) [No change in text.]

(16~~3~~) [No change in text.]

(17~~4~~) [No change in text.]

(18~~5~~) [No change in text.]

(19~~6~~) [No change in text.]

(20~~17~~) [No change in text.]

(21~~18~~) [No change in text.]

(22~~19~~) [No change in text.]

* * *

Rule 26(b). Discovery Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.*

(A) Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(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. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless order disclosure or discovery from such sources if the requesting party shows good cause considering the limitations in the final paragraph of subsection (b)(1) of this Rule. The court may specify conditions for the disclosure or discovery.

(C) The frequency or extent of use of the discovery methods set forth in subdivision (a) may be limited by the court if it determines that: (i) the

discovery sought is unreasonably cumulative or duplicative, or obtainable from some other source that is either more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, given the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

* * *

Rule 26.1. Prompt Disclosure of Information

(a) Duty to Disclose, Scope. Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1)-(7) [No change in text.]

(8) The existence, location, custodian, and general description of any tangible evidence, ~~or~~ relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, ~~and~~ copying, testing or sampling. Unless good cause is stated for not doing so, a copy of ~~each~~ the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

(b)-(e) [No change in text.]

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) *Information Withheld.* When information is withheld from disclosure or discovery on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

(2) *Information Produced.* If a party contends that information subject to a claim of privilege or of protection as trial-preparation material has been inadvertently disclosed or produced in discovery, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has made and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

State Bar Committee Note
2008 Amendment

As with its federal counterpart, the amendment is intended merely to place a "hold" on further use or dissemination of an inadvertently produced document that is subject to a privilege claim until a court resolves its status or the parties agree to an appropriate disposition. The amendment, however, "does not address whether the privilege or protection that is asserted after production was waived by the production." Fed. R. Civ. P. 26(b)(5)(B), Advisory Committee Notes on 2006 Amendment.

Rule 26.2. Exchange of Records and Discovery Limitations in Medical Malpractice Cases

(a) Exchange of Records.

(1)- (2) [No change in text.]

(3) In lieu of serving copies of the above-described records counsel may, before the date set for exchange of records, inquire of opposing counsel concerning the documents or electronically stored information which opposing counsel wishes produced and may then produce copies of only those records which are specifically requested.

* * *

Rule 33(c). Option to produce business records

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be

derived or ascertained and to afford the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be derived or ascertained.

* * *

Rule 34. Production of documents, electronically stored information, and things and entry upon land for inspection and other purposes.

(a) Scope. Any party may serve on any other party requests (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test or sample any designated documents or electronically stored information – ~~(~~including writings, drawings, graphs, charts, photographs, sound recordings, images ~~phono records~~, and other data or data compilations stored in any medium from which information can be obtained~~,~~ – translated ~~through detection devices~~ into reasonable~~y~~ usable form when translation is practicably necessary~~)~~, or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure and Limitations. The requests may, without leave of the court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The requests shall set forth the items to be inspected either by individual item or by specific category, and describe each item and specific category with reasonable particularity. The request may specify the form or forms in which electronically stored information is to be produced. The requests(s) shall not, without leave of court, cumulatively include more than ten (10) distinct items or specific categories of items. Each request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. If a party believes that good cause exists for more than ten (10) distinct items or categories of items, that party shall consult with the party upon whom a request would be served and attempt to secure a written stipulation to that effect. The party upon whom a request is served shall serve a written response within 40 days after the service of the request, except that a defendant may serve a response within 60 days after service of the summons and complaint upon that defendant, or execution of a waiver of service by that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested or identify the reasons for any objection ~~unless the request is objected to~~, including any objection to the requested form or forms for producing electronically stored information, ~~in which event the reasons for the objection shall be stated~~. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing

electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting a request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested. Unless the parties otherwise agree, or the court otherwise orders:

(1) ~~A~~a party who produced documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

* * *

Rule 37(g). Electronically stored information

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

* * *

Rule 45. Subpoena

(a) Form; issuance.

(1) Every subpoena shall

(A)-(B) [No change in text.]

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, ~~and~~ copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the recipients' rights and obligations under the subpoena as follows:

. . . .

A command to produce evidence or to permit inspection, copying, testing, or sampling, may be joined with a command to appear at trial or hearing or at deposition or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the superior court for the county in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the superior court for the county in which the case is pending. If separate from a subpoena commanding the attendance of a person, a subpoena for production, ~~or~~ inspection, copying, testing, or sampling shall issue from the superior court for the county in which the production or inspection is to be made.

(b) Service

(1)-(5) [No change in text.]

(c) Protection of Persons Subject to Subpoenas

(1) [No change in text.]

(2)(A) A person commanded to produce and permit inspection ~~and~~, copying, testing, or sampling of designated books, papers, documents, electronically stored information or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection ~~and~~, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing ~~inspection or copying of~~ any or all of the designated materials or inspection of the premises – or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect ~~and~~, copy, test, or sample the materials except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from ~~significant~~ undue burden or expense resulting from the inspection ~~and~~, copying, testing, or sampling commanded.

(3) [No change in text.]

(d) Duties in Responding to Subpoena

(1) [No change in text.]

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If a person contends that information that is subject to a claim of privilege or of protection as trial-preparation material has been inadvertently produced in response to a subpoena, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e)-(g) [No change in text.]