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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULES 16, 26, 26.1, 33, 34, 37, AND 45, ARIZONA RULES OF CIVIL PROCEDURE

Supreme Court No. R-06-0034

Comments of the State Bar of Arizona Regarding Petition to Amend the Arizona Rules of Civil Procedure to Adopt Electronic Discovery Rules

The State Bar of Arizona agrees with the petitioners that the Arizona Rules of Civil Procedure should be amended to deal with the increasingly difficult discovery issues associated with electronically stored information. Managing electronic discovery is not just a concern of the federal courts. As noted recently by the Conference of Chief Justices, "because of the near universal reliance on electronic records both by businesses and individuals, the frequency with which electronic-discovery related questions arise in state courts is increasing rapidly, in all manner of cases." CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION vi-vii (approved August 2006).

The State Bar also agrees with the petitioners that adopting procedures similar to those found in the recent amendments to the Federal Rules of Civil Procedure would go a long way in helping the Arizona state courts to deal with these emerging issues. The petitioners' proposed amendments to Rules 16(b) and 26.1, however, fall short of what is

needed because they do not direct parties to confer at the outset of a case about electronic discovery issues, and because they do not provide the courts or parties with guidance about the issues they should address. Modifications of the proposed changes to those Rules are recommended below, along with several other less significant changes to the petitioners' other proposed rule changes. As modified, the State Bar supports the petitioners' proposed rule changes and urges this Court to adopt them.

The Issues Presented by Discovery of Electronically Stored Information

Like it or not, we live in an age of electronic record-keeping and communications. "At least 93 percent of information created today is first generated in digital format, 70 percent of corporate records may be stored in electronic format, and 30 percent of electronic information is never printed to paper." THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT DISCOVERY 4 (The Sedona Conference Working Group Series, July 2005 Version). Moreover, emails have largely replaced letters, memoranda, and even telephone calls. The average employee processes 75 emails a day, and, in 2005 alone, 2.8 billion emails were sent and received within the United States. COMMENTARY ON EMAIL MANAGEMENT: GUIDELINES FOR THE SELECTION OF POLICY AND ARCHIVING SOLUTIONS 1 (The Sedona Conference Working Group Series, Draft May 5, 2006).

This electronic revolution is already changing the nature of discovery, transforming what was once a paper-dominated world into one increasingly dominated by electronically stored information. This new world has brought with it some new problems for courts and lawyers in conducting discovery:

(1) ***Is electronically stored information discoverable?*** Since 1970, Arizona Rule of Civil Procedure 34(a) has defined "document" to include "data compilations" stored in electronic media, but Arizona lawyers are not always aware of (or

willing to acknowledge) their clients' obligation to produce electronically stored information, leading to unnecessary discovery disputes.

(2) ***In what format must electronic records be produced?*** Even when parties acknowledge an obligation to produce electronically stored information, disputes often arise over the form and formats in which such information should be produced. Some lawyers insist that they are required to produce such information in hard-copy only, and that they are not required to produce the information in an electronic format. And even if that is not an issue, legitimate differences can arise in agreeing upon the electronic format in which such information should be made available:

(a) Electronically stored information can be made available in "native" format (where a document is produced and displayed in the same way in which it appears on the creator's or document custodian's computer screen, with all the same functionality), or in TIFF, PDF or other static image format (where a document is produced and displayed much as it would appear to the creator or document custodian when it is retrieved from a printer). The difference is significant. A document produced in "native" format carries with it metadata, which is information that does not appear in the final "printed-out" (or static image) form of a document. Metadata includes not only bibliographic information about the document (such as author, creation and last date of modification, and, in the case of emails, the date sent or received), but may also reveal track-changes showing earlier versions of the document, comments of others on the document, and sometimes even other documents that were embedded (but hidden) for the author's or recipients' reference.

(b) And beyond the basic differences between "native" and static image (or "non-native") production formats, there are a number of other issues to resolve, including whether all or part of the metadata fields should be deleted or "purged" before production (and, depending on the type of document, there can be hundreds of metadata

fields), whether the document should be word-searchable (which can be done in either "native" or static image formats), and whether the form of the documents produced in "native" may be copied and altered by the receiving party (which, for example, may be helpful to a damage expert in using financial spreadsheets to perform new calculations) or will be made available in "read-only" mode, locking documents against any changes (which helps to resolve later questions about authenticity).

(c) Complicating these choices is cost. More is not always necessarily better, as greater access to the "hidden" metadata in electronic records often requires additional lawyer review time both before and after production, and generally requires retaining a third-party vendor (or consultant) to provide the hardware and software needed to retrieve, process, produce and review electronic records. Those litigants who choose a "native" format also face the thorny problem of how to keep track of the records they produce and to redact those that are partially privileged, as the technology does not yet exist to allow an attorney to place production numbers or redactions directly on the "native" version of an electronic record or its metadata.

(3) ***Does accessibility matter?*** Issues also can arise over electronically stored information that is difficult and expensive to extract. Not all electronically stored information is alike.

(a) Most businesses have computerized back-up systems that collect electronically stored information on back-up tapes that can be used to restore data to a computer system if it suffers a catastrophic system failure. These back-up tapes often contain data and electronic records that already have been deleted from a party's active computer system, but because back-up systems are designed for disaster recovery and not for document retrieval, it is frequently a painstaking and expensive process to identify and extract documents regarding particular subjects or involving particular authors or recipients. Moreover, even technologically sophisticated companies often lack the

hardware, software, and in-house IT support required to restore or search back-up tapes, requiring the retention of yet another third-party vendor to assist with this process.

(b) Other data may be stored in data storage media that can no longer be read because a party has replaced the software or hardware needed to read it, and, in some cases, the necessary software or hardware may not even be available because its manufacturer has replaced it with newer software or hardware that is incompatible with its prior offerings.

(c) Other data may be accessible only through exacting (and expensive) computer forensic techniques, such as when the archival media has been damaged, when a party wishes to extract certain information from a computer's hard-drive that is not otherwise accessible through the computer's operating system or software, or when "overwritten" data is sought from recycled magnetic or digital media.

(4) ***What steps need to be taken to preserve electronically stored information?*** Lawyers are often blind-sided by the unique preservation issues associated with electronically stored information. As the accumulation of electronic data can quickly overwhelm even large storage systems, the software in virtually every business computer has automatic deletion and overwriting protocols to manage and store data. To avoid what otherwise would be prohibitively expensive archival costs, storage devices are similarly designed to recycle back-up tapes, which necessarily results in the loss of older records as old data on the tapes are overwritten by new data. For most businesses, stopping these processes across the board would be not only logistically difficult, it also would cause a major disruption of on-going business operations. That does not mean that a lawyer cannot selectively intervene to prevent the loss of particular categories of data that may be relevant in a case, but it generally requires a good understanding of a client's operating and back-up systems, and a solid understanding of the issues that are likely to be important in a case.

The Adequacy of the Current Rules and the Recent Federal Rule Amendments

Under the current Arizona Rules of Civil Procedure, parties can discuss all of the just-described issues and, in theory, a court can resolve the parties' differences under its broad powers under Rule 16(b) to address all discovery issues and to "[m]ake such other orders as the court deems appropriate." Ariz. R. Civ. P. 16(b)(18). But the current Rules give Arizona courts little guidance about how they should decide these issues, resulting in a patchwork of ad-hoc, and often unpredictable, rulings. Parties are left equally adrift, without guidance from the Rules to govern their discussions about these subjects. With each new case, negotiations over these issues start on a blank-slate, requiring the reinvention of rules and conventions that should be followed.

To address these issues, the State Bar agrees with the petitioners that it is worth looking at the recently adopted amendments to the Federal Rules of Civil Procedure governing electronic discovery. Among other things:

(1) The rule amendments highlight that electronically stored information is discoverable from both the litigants and third-parties, and, for the first time, expressly state that such information may be required to be produced in electronic form. *E.g.*, Fed. R. Civ. P. 34(a) (referring to the production of "documents or electronically stored information").

(2) Federal Rule 26(f) now requires parties at the outset of a case to discuss issues relating to the production of electronic records, including the form and format in which they should be produced, issues related to the preservation of potentially relevant information, and issues related to privilege protection if privileged materials are inadvertently produced. *Id.* 26(f). Additionally, changes in Rule 16 now identify these issues among those that must be discussed with the court during the initial Rule 16 scheduling conference that is held shortly after a case is filed. *Id.* 16(b)(5) & (6).

Complementing these provisions is Rule 37(f), 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." *Id.* 37(f). This provision gives a party a powerful incentive to address these issues at the outset of a case to lay the foundation for qualifying under Rule 37(f)'s "safe harbor."

(3) Federal Rules 34(b) and 45(d) give parties a decision-path to follow in determining whose preferences will govern in determining the form and format of the production of electronic records. Under Rule 34, the requesting party may specify the form and format of production, and the responding party must comply with that request unless it objects, with the court resolving any objections that cannot be resolved by the parties. *Id.* 34(b). Similarly, a person responding to a subpoena must either honor a requesting party's preferences or make an objection. *Id.* 45(c)(2)(B). Under both rules, if the requesting party fails to specify the form and format of production, the responding party is given the option of producing the records either in the form "in which it is ordinarily maintained" or in a form that is "reasonably usable." *Id.* 34(b)(ii) & 45(d)(1)(B).

(4) Federal Rules 26(b) and 45(d) now provide that a party (or a person responding to a subpoena) need not produce electronic records that are not "reasonably accessible because of undue burden or cost," but put the burden on the responding party to make that showing if challenged in a motion to compel. *Id.* 26(b)(2)(B) & 45(d)(1)(D). If such a showing is made, the requesting party may nonetheless obtain those records if it demonstrates "good cause," and the rules authorize the court to "specify conditions for the discovery," even if good cause is shown. *Id.*

The Proposed Changes and the State Bar's Suggested Modifications

Although the federal rule amendments do not solve every problem associated with electronic discovery, they do provide an even-handed framework in which electronic

discovery issues are identified at the outset of a case so they can be discussed (and negotiated) by the parties and, if necessary, resolved by a court. The State Bar also agrees with the petitioners that to the extent feasible and appropriate, the Arizona Rules of Civil Procedure ought to be amended to incorporate the federal rule amendments.

The State Bar, however, recommends that the petitioners' proposed changes to Arizona Civil Procedure Rules 16(b) and 26.1 be modified because they currently do not provide a mechanism by which parties are forced to address electronic discovery issues early in a case and, if necessary, to get such issues resolved promptly by a court. Key to the operation 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, coupled with the requirement that those issues be discussed and resolved at the Rule 16(f) scheduling conference, which takes place before any substantial discovery occurs. The Arizona Rules of Civil Procedure, however, have no substantially similar counterparts to those provisions. The Arizona Rules do not require parties to conduct a discovery planning meeting, like that required under Federal Rule 26(f). Moreover, hearings under Arizona Rule 16(b) often come much later in a case than do federal Rule 16 scheduling conferences, and are frequently devoted only to finalizing mid-stream discovery deadlines and setting a trial date.

The petitioners' proposed rule changes would not fully bridge this gap between the federal and Arizona rules:

(1) Rule 16(b) would be amended to expressly authorize courts to consider electronic discovery issues, but there is nothing in the proposed amendments that affords guidance to the courts as to what they may consider or provides that parties may obtain a hearing on these issues in advance of a hearing regarding the other issues listed under the Rule. The proposed amendment also lists electronic discovery issues among those items that a court may "schedule." The issues that need to be addressed, however,

are not scheduling issues, but rather are issues that should be resolved before any electronic discovery gets underway.

(2) More troubling is the proposed change to Rule 26.1, which would provide that, absent good cause, electronically stored information should be produced with the custodian party's disclosure statement. The proposed rule appears to invite a party to produce its electronic records without first 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 parties prefer. It also might encourage parties to try to dictate the form of production by producing their electronic records in particular format before a receiving party has an opportunity to request some other format. The proposed rule change also lacks any requirements similar to those found in Federal Rule 26(f) directing the parties to confer over issues related to the preservation of such electronically stored information, or any issues relating to the relative accessibility of such information. It also does not tie together the provisions of Rule 26.1 with the proposed amendment to Rule 26(b)(1), which incorporates the federal rule provision in Rule 26(b)(2)(B) that allows a party to object to producing electronically stored information that it claims is not "reasonably accessible."

To remedy these concerns, the State Bar recommends modifying the petitioners' proposed changes to Rules 16(b) and 26.1 in the manner shown in Exhibits A and B:

First, similar to the requirements in Federal Rule 26(f), Rule 26.1(f) should be amended to require that if a party identifies electronically stored information in its disclosure statement, the parties should be required to promptly confer about: (a) the form of production; (b) any party's claim that the information is not reasonably accessible; (c) any preservation issues that may arise from the loss of information because of the routine operation of a party's computer system; and (d) if the number of electronic records is voluminous, whether the parties should enter an agreement minimizing the loss of

privilege protection if a privileged record is inadvertently produced. [Exhibit A] The Rule also should be amended to provide that although a party has an obligation to disclose the *existence* of electronically stored information that it contends is not "reasonably accessible," its obligation to make it *available* for inspection or copying is "subject to [proposed] Rule 26(b)(1)(B)," which provides a procedure for resolving this issue. [*Id.*]

Second, Rule 16(b) should be amended to expressly provide (similar to, but more explicitly than, Federal Rule 16) that a court may address requirements or limitations for the disclosure or discovery of electronically stored information, the form of production and preservation of such information, and any agreement that the parties may reach regarding privilege protection in the production of such materials.[1] [Exhibit B]

The State Bar also recommends that the Court include comments with both rules (also shown in Exhibits A and B) distilling the key elements in the federal Advisory Committee Notes regarding these issues, as well as telling litigants and the courts that a Rule 16(b) hearing on these issues does not need to wait until the parties are ready to discuss final pretrial scheduling or the other issues listed in Rule 16(b). Additionally, consistent with the Conference of Chief Justices' guidelines regarding electronic discovery, the comment to Rule 16(b) should state that a court may choose to limit or impose conditions upon the disclosure of electronically stored information, taking into account (among other factors) "[its] relative accessibility," "the costs and burdens on the parties in making such information available, the probative value of such information, and

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[1] Federal Rule 16(b) does not explicitly identify the preservation of electronically stored information as among the issues that may be considered at a Rule 16 scheduling conference. Rule 26(f), however, expressly provides that "any issues relating preserving discoverable information" must be discussed in the discovery planning meeting, and a court clearly has the authority to consider this subject under the broad language used in Rule 16(b)(5), which encompasses any topic relating to "provisions for disclosure or discovery of electronically stored information." To underscore the importance of the issue and to avoid any confusion, the State Bar suggests that Arizona Rule 16(b) should explicitly state that a court may consider this issue.

the amount of damages (or the type of relief) at issue in the case." 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). Including these factors in a comment would provide courts with guidance about how to exercise their discretion, especially in cases where the costs of producing particular types or formats of electronic records may start to approach (or exceed) the amount at stake.

Other Suggested Changes

The State Bar also recommends several other, less major modifications to petitioners' proposed rule changes:

(1) ***Rule 26(b)(1):*** The proposed amendment to Rule 26(b)(1), which incorporates Federal Rule 26(b)(2)(B) regarding the treatment of electronic records that a party claims are not "reasonably accessible," should be modified to make it clear that the amended rule governs not only requests made under Rule 34, but also disclosures under Rule 26.1. The proposed modification is shown in Exhibit C. It requires only the addition of the phrase "disclosure or" before the words "discovery from" when those words appear in the last sentence of the proposed amendment. Additionally, for clarity, the paragraphs in Rule 26(b)(1) should be broken into separate subparts (denominated by subparts (A), (B), and (C)), similar to its federal rule counterpart.

(2) ***Rule 26.1(f):*** Similarly, the proposed amendment to Rule 26.1(f), which incorporates Federal Rule 26(b)(5)(B) regarding privilege claims that are asserted after production, should be modified to make it clear that it applies not only to material produced under Rule 34, but also to material disclosed under Rule 26.1. The proposed modification is shown in Exhibit D. All that is required is to insert the words "disclosure or" before the words "produced in discovery" in the first sentence of the proposed

amendment. Also, to achieve consistency with the format used elsewhere in the Rules of Civil Procedure, the subparts should be denominated as "(1)" and "(2)" rather than "(A)" and "(B)" (also shown in Exhibit D).

Additionally, some have expressed concern that the introductory clause of the proposed rule could be misinterpreted as requiring parties to disclose privileged material and then to litigate over the materials' protected status. To avoid such a misinterpretation, the State Bar recommends that the first clause of the proposed Rule be modified to say "If *a party contends that* information *has been* ~~is~~ *inadvertently disclosed or* produced in discovery that is subject to a claim of privilege or of protection as trial preparation material . . ." (added language shown in italics & deletions in strike-through). A corresponding change would need to be made to Rule 45(d)(2), shown in Exhibit E.

Last, because the federal amendment has sometimes been misunderstood as saying that a party does not waive privilege protection for an inadvertently produced record, the comment to the Rule amendment should say (as does its federal counterpart) that the Rule is intended merely to put a "hold" on further use or dissemination of such a record until a court can rule on whether a privilege waiver has occurred. That principle is already set forth in Arizona's ethical rules in ER 4.4(b).[2] The Rule amendment would merely bring the Arizona Rules of Civil Procedure into conformity with those ethical requirements. A draft comment is also included in Exhibit D.

(3) ***Interpretive Comments:*** To provide guidance to parties and the courts, each of the proposed amendments should be accompanied by a short comment indicating that in interpreting the amendment, courts may look for guidance to federal law, as well as the Advisory Committee Notes to the 2006 amendments to the Federal

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[2] Rules of the Supreme Court of Arizona, Rule 42, ER 4.4(b) ("A lawyer who receives a document and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures.").

Rules of Civil Procedure. Suggested comments for the proposed amended Rules 26(b)(1) and 26(b)(5) are attached in Exhibits C and D. Suggested comments for the proposed amendments to Rules 33, 34, 37 and 45 are attached in Exhibit F.

Conforming Amendments to Rules 16.3, and to Rules 16(c) and 26.2

The State Bar also recommends a few modest changes to several other rules that may be affected by the proposed rule amendments:

First, for consistency, the proposed amendments to Rule 16(b) should also be made in Rule 16.3, governing the initial case management conference in cases assigned to the Complex Civil Litigation Program. Proposed amendments incorporating these changes are attached in Exhibit G.

Second, minor changes should be made in Rule 16(c) and Rule 26.2 to make it clear that the provisions governing documents and other materials in medical malpractice cases also extend to electronically stored information. In Rule 16(c)(1), the State Bar suggests adding the phrase "electronically stored information" in the second sentence of the Rule so it provides that a court may determine "what additional documents, electronically stored information, and other materials are to be exchanged." Similarly, the State Bar proposes that the same phrase be inserted into Rule 26.2(a)(3) so it provides that counsel may "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." Proposed amendments incorporating these changes are attached in Exhibits H and I.

Consideration also should be given to amending the Rule of Family Law Procedure to incorporate provisions governing electronic discovery. The State Bar, however, believes that further study is required before any action is taken. Special considerations may apply to managing electronic discovery issues in Family Court. The procedural setting and discovery issues are often different from those encountered in other types of

civil litigation. Additionally, because a substantial proportion of the litigants in Family Court are not represented by counsel, greater judicial oversight may be needed in allowing parties to gain access to electronically stored information from each other and third-parties. Because of these factors, more may be required than merely incorporating provisions of the recent federal rule amendments into the Rules of Family Law Procedure. As such, the State Bar recommends deferring consideration of amending those Rules to allow those issues to be investigated.

Conclusion

The State Bar of Arizona respectfully requests that the Court adopt the petitioners' proposed rule changes with the modifications suggested in this comment and shown in Exhibits A-I.

RESPECTFULLY SUBMITTED this _21st day of May, 2007.

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EXHIBIT A

State Bar's Suggested Modifications to Petitioners' Proposed Amendments to Rule 26.1(a)

- Petitioners' proposed additions shown by underscoring (e.g., **stored**) and deletions shown by strike-through (e.g., ~~**stored**~~)
- State Bar's proposed additions shown in italic (e.g., ***stored***) and deletions shown by strike-through of petitioners' underscored additions (e.g., ~~**stored**~~)

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:

*** * * ***

(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***, subject to Rule 26(b)(1)(B),*** 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**.

(A) Unless good cause is stated for not doing so, a copy of ~~**each**~~***each*** ~~**the**~~ document~~**s 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 document~~**s or 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) If a party's disclosure statement identifies electronically stored information that is in its custody, the parties shall promptly confer to discuss any issues relating to the disclosure of that information, including (i) the form or forms in which it should be produced, (ii) the relative accessibility of such information and the burdens associated with producing it, (iii) reasonable measures to preserve such information against loss or destruction due to routine computer operations, and (iv) if the records are voluminous, whether the parties should enter an agreement minimizing any loss of protection if a party inadvertently produces privileged or trial-preparation material. If electronically stored information is not in the custody of the party disclosing it, that party shall disclose the name and address of the custodian of that information in its disclosure statement.

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 26.1(a) was amended to clarify a party's disclosure obligations with respect to electronically stored information. Rule 26.1's disclosure obligations extend to electronically stored information, but the production of such information is subject to

special considerations that warrant requiring the parties to confer about certain issues before any production of it occurs.

First, the parties should discuss the form in which the electronically stored information should be produced. There are a variety of formats and forms in which such information can be made available, which cautions against the production of such material until the parties have conferred in an attempt to agree on the manner in which it will be produced. Because of the expense that is sometimes involved in reviewing and producing electronically stored information, the parties may also agree to certain limitations on the production of records in electronic form, choosing instead to translate electronic records into hard-copies or selecting other production formats that may be less expensive to review, produce, and archive.

Second, the parties should discuss any categories of electronically stored information that a custodian party claims is not reasonably accessible because of undue burden or cost. Under Rule 26(b)(1)(B), a party is not obligated to produce such information absent a court order. Before seeking recourse to the court, the parties should attempt to resolve the issue by negotiation.

Third, the parties should discuss measures to preserve potentially relevant electronically stored information that may be lost or destroyed through routine computer operations, such as automatic deletion protocols or recycling of back-up tapes. This rule does not augment or diminish any legal obligation a party may have to preserve discoverable information. It does, however, require the parties to discuss practical ways to accommodate a party's need to preserve specific categories of potentially relevant

information for use in the case with the custodian party's need to continue routine computer operations that may be important to its on-going commercial or public activities.

Fourth, 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. Cf. Fed. R. Civ. P. 26(f), Advisory Committee Notes on 2006 Amendment (discussing the use of "quick peek" and "clawback" agreements as a means of reducing the costs of privilege review and minimizing the risk of inadvertent waivers of privilege claims).

If the parties are unable to reach agreement on these issues, any party may seek a hearing under Rule 16(b) to ask the court to resolve them. As these issues are likely to arise early in a case, such a request need not wait until the parties are ready to address trial-setting issues or other issues listed in Rule 16(b).

EXHIBIT B

State Bar's Suggested Modifications to Petitioners' Proposed Amendments to Rule 16(b)(1)

- Petitioners' proposed additions shown by underscoring (e.g., **stored**) and deletions shown by strike-through (e.g., ~~**stored**~~)
- State Bar's proposed additions shown in italic (e.g., ***stored***) and deletions shown by strike-through of petitioners' underscored additions (e.g., ~~**stored**~~)

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 therefore.

(A) The schedule shall include depositions to be taken and the time for taking same; production of documents **or electronically stored information, including the form or forms in which the** ~~**electronically stored information should be produced**~~; 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, t*** ~~**T**~~**he** ***c*** ~~**C**~~**ourt may** ~~**also adopt any agreements the parties reach for asserting claims of privilege or of protection as to trial-preparation material after production.**~~ ***enter orders addressing any 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.

STATE BAR COMMITTEE NOTE
200_ 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).

EXHIBIT C

State Bar's Suggested Modifications to Petitioners' Proposed Amendments to Rule 26(b)(1)

- Petitioners' proposed additions shown by underscoring (e.g., **stored**) and deletions shown by strike-through (e.g., ~~**stored**~~)
- State Bar's proposed additions shown in italic (e.g., ***stored***) and deletions shown by strike-through of petitioners' underscored additions (e.g., ~~**stored**~~)

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 cost. 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 cost. If that showing is made, the court may nonetheless order *disclosure or* discovery from such sources if the requesting party shows good**

cause. 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).

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 26(b)(1) was amended to incorporate into the Arizona Rules of Civil Procedure the provisions of the 2006 amendments to Federal Rule of Civil Procedure 26(b)(2)(B). Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

EXHIBIT D

State Bar's Suggested Modifications to Petitioners' Proposed Amendments to Rule 26.1(f)

- Petitioners' proposed additions shown by underscoring (e.g., **stored**) and deletions shown by strike-through (e.g., ~~**stored**~~)
- State Bar's proposed additions shown in italic (e.g., ***stored***) and deletions shown by strike-through of petitioners' underscored additions (e.g., ~~**stored**~~)

Rule 26.1(f). Claims of Privilege or Protection of Trial Preparation Materials

(*1*~~A~~) 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 consent the claim.

(*2*~~B~~) Information Produced. If *a party contends that* information *has been* ~~is~~ *inadvertently disclosed or* produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, 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

200_ Amendment

Rule 26.1(f) was amended to incorporate into the Arizona Rules of Civil Procedure the provisions of the 2006 amendments to Rule 26(b)(5) of the Federal Rules of Civil Procedure. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendment, for guidance in interpreting this 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.

EXHIBIT E

State Bar's Suggested Modifications to Petitioners' Proposed Amendments to Rule 45(d)(2)

- Petitioners' proposed additions shown by underscoring (e.g., **stored**) and deletions shown by strike-through (e.g., ~~**stored**~~)
- State Bar's proposed additions shown in italic (e.g., ***stored***) and deletions shown by strike-through of petitioners' underscored additions (e.g., ~~**stored**~~)

Rule 45(d). Duties in Responding to Subpoena

(2)(A) 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 consent the claim.

(B) If ***a person contends that*** **information** ***has been*** ~~**is**~~ ***inadvertently*** **produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, 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 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 person who produced the information must preserve the information until the claim is resolved.**

EXHIBIT F

(1) Proposed Note following Arizona Rule of Civil Procedure 33(c):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 33(c) was amended to incorporate into the Arizona Rules of Civil Procedure the 2006 amendments to Federal Rule of Civil Procedure 33(c) regarding electronic discovery issues. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

(2) Proposed Note following Arizona Rule of Civil Procedure 34(a):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 34(a) was amended to incorporate into the Arizona Rules of Civil Procedure the 2006 amendments to Federal Rule of Civil Procedure 34(a) regarding electronic discovery issues. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

(3) Proposed Note following Arizona Rule of Civil Procedure 34(b):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 34(b) was amended to incorporate into the Arizona Rules of Civil Procedure certain provisions of the 2006 amendments to Federal Rule of Civil Procedure 34(b) regarding electronic discovery issues. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

(4) Proposed Note following Arizona Rule of Civil Procedure 37(g):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 37(g) was added to Rule 37 to incorporate into the Arizona Rules of Civil Procedure the provisions of Rule 37(f) of Federal Rules of Civil Procedure. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule, for guidance in interpreting this amendment.

(5) Proposed Note following Arizona Rule of Civil Procedure 45(a):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 45(a) was amended to incorporate into the Arizona Rules of Civil Procedure certain provisions of the 2006 amendments to Federal Rule of Civil Procedure 45(a) regarding electronic discovery issues. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

(6) Proposed Note following Arizona Rule of Civil Procedure 45(b):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 45(b) was amended to incorporate into the Arizona Rules of Civil Procedure certain provisions of the 2006 amendments to Federal Rule of Civil Procedure 45(b) regarding electronic discovery issues. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

(7) Proposed Note following Arizona Rule of Civil Procedure 45(c):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 45(c) was amended to incorporate into the Arizona Rules of Civil Procedure certain provisions of the 2006 amendments to Federal Rule of Civil Procedure 45(c) regarding electronic discovery issues. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

(8) Proposed Note following Arizona Rule of Civil Procedure 45(d):

STATE BAR COMMITTEE NOTE

200_ Amendment

Rule 45(d) was amended to incorporate into the Arizona Rules of Civil Procedure certain provisions of the 2006 amendments to Federal Rule of Civil Procedure 45(d) regarding electronic discovery issues. Courts may look to federal law, as well as the Advisory Committee Notes associated with the federal rule amendments, for guidance in interpreting this amendment.

EXHIBIT G

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) Status of parties and pleadings

(2) Determining whether severance, consolidation, or coordination with other actions is desirable;

(3) Scheduling motions to dismiss or other preliminary motions;

(4) Scheduling class certification motions, if applicable;

(5) Scheduling discovery proceedings, setting limits on discovery and determining whether to appoint a discovery master;

(6) Issuing protective orders;

(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~~) Appointing liaison counsel and admission of non-resident counsel;

(11~~8~~) Scheduling settlement conferences;

(12~~9~~) Notwithstanding Rule 26.1, the establishment and timing of disclosure requirements;

(13~~0~~) Scheduling expert disclosures and whether sequencing of expert disclosures is warranted;

(14~~1~~) Scheduling dispositive motions;

(15~~2~~) Adopting a uniform numbering system for documents and establishing a document depository;

(16~~3~~) Determining whether electronic service of discovery materials and pleadings is warranted;

(17~~4~~) Organizing a master list of contact information for counsel;

(18~~5~~) Determining whether expedited trial proceedings are desired or appropriate;

(19~~6~~) Scheduling further conferences as necessary;

(20~~17~~) Use of technology, videoconferencing and/or teleconferencing;

(21~~18~~) Determination of whether the issues can be resolved by summary judgment, summary trial, trial to the court, jury trial, or some combination thereof;

(22~~19~~) Such other matters as the court or the parties deem appropriate to manage or expedite the case.

EXHIBIT H

State Bar's Proposed Amendments to Rule 16(c)

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 therefore. 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.

EXHIBIT I

State Bar's Proposed Amendment to Rule 26.2(a)

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

(a) Exchange of Records.

(1) Within five days of the date that plaintiff notifies the court pursuant to Rule 16(c) of these Rules that all served defendants have either answered or filed motions, plaintiff shall serve upon defendant copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action.

(2) Within ten days of the date of service by plaintiff of such records, each defendant shall serve upon plaintiff copies of all of plaintiff's medical records relevant to the condition which is the subject matter of the action.

(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.

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