

SUPREME COURT OF ARKANSAS

No. 08-923

IN RE: ELECTRONIC DISCOVERY
AND PROPOSED
ARK. R. CIV. P. 26.1

Opinion Delivered March 5, 2009

PER CURIAM

The Arkansas Bar Association petitioned the court to amend the Arkansas Rules of Civil Procedure by adding Rule 26.1 to address electronic discovery. The petition was referred to our Committee on Civil Practice. The committee collaborated with the Bar's Task Force on Electronic Discovery, which had done the work that gave rise to the Bar's petition, to resolve both issues of form and substance. In the end, there were two areas of disagreement.

The committee recommends that the rule apply only where the parties agree or the trial court so orders in response to a motion. The Bar had proposed that any party could trigger the rule. We agree with the committee that current Rule 26 can deal with most cases and that the new rule needs to be tested in limited application to see how it works. We will publish the committee's language regarding subdivisions (b) and (c), and the Bar's alternative approach can be compared by reference to the footnote.

The other issue of disagreement relates to the form of production. The Bar recommended that the requesting party specify the form in which the responding party must produce the electronic information. The committee suggests that the new rule follow the

approach of current Rule 26 and the Arkansas Freedom of Information Act, to-wit: electronic information is to be produced in the form in which it is ordinarily kept. We agree and incorporate the committee's provision in R. 26.1(g). The Bar's alternative version is illustrated in the corresponding footnote.

We express our gratitude to the Arkansas Bar Association and in particular the members of the Task Force on Electronic Discovery and to our Committee on Civil Practice for their labor on this important subject.

Comments on this suggested rule should be made in writing before May 15, 2009 to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

Arkansas Rule of Civil Procedure 26.1. Electronic Discovery.

(a) Definitions.

In this rule:

- (1) "Discovery" means the process of providing information in a civil proceeding in the courts of this state pursuant to the Arkansas Rules of Civil Procedure or these rules.
- (2) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
- (3) "Electronically stored information" means information that is stored in an electronic medium and is retrievable in perceivable form.
- (4) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture; public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(b) *Supplemental and optional rule.*

This rule is intended to supplement the Arkansas Rules of Civil Procedure, and the Arkansas Rules of Civil Procedure shall govern if there is a conflict between this supplemental rule and the Rules of Civil Procedure. The rule is optional because either the parties must agree that it will apply, or the circuit court must order that it will apply on motion for good cause shown.¹

(c) *Conference, plan, and report.*

- (1) In any proceeding in circuit court, the parties may agree to pursue electronic discovery pursuant to this rule or the court may so order on motion for good cause shown. Any such agreement or motion shall be made within 120 days after the date that the complaint was filed. The court, however, may extend or reopen this period for good cause. Within 30 days of an agreement or order to proceed under this rule, the parties shall confer. At this conference, the parties shall discuss and plan for the following issues:
 - (A) any issues relating to preservation of discoverable information;
 - (B) the form in which each type of the information will be produced;
 - (C) the period within which the information will be produced;
 - (D) the method for asserting or preserving claims of privilege or of

¹ ~~This rule is optional because a party must file and serve a notice invoking the rule.~~

(c) *Conference, plan, and report.*

- (1) ~~In any proceeding in circuit court, any party may invoke this rule by filing and serving notice that the party intends to pursue electronic discovery pursuant to this rule. Any such notice shall be made within 180 days after the date that the complaint was filed. The court, however, may extend or reopen this period for good cause. Within 30 days of the date of service of the notice, the parties shall confer. At this conference, the parties shall discuss and plan for the following issues:~~

protection of the information such as trial-preparation materials, including the manner in which such claims may be asserted after production;

- (E) the method for asserting or preserving confidentiality and proprietary status of information relating to a party or a person not a party to the proceeding;
- (F) whether allocation among the parties of the expense of production is appropriate; and,
- (G) any other issue relating to the discovery of electronically stored information.

(2) Following the planning conference, the parties shall:

- (A) develop a proposed plan relating to discovery of the information; and
- (B) not later than 14 days after the conference under subdivision (c)(1), submit to the court a written report that summarizes the plan and states the position of each party as to any issue about which they are unable to agree.

(d) Order governing discovery.

(1) In a civil proceeding, the court may issue an order governing the discovery of electronically stored information pursuant to:

- (A) a motion by a party seeking discovery of the information or by a party or person from which discovery of the information is sought;
- (B) a stipulation of the parties and of any person not a party from which discovery of the information is sought, or
- (C) the court's own motion, after reasonable notice to, and an opportunity to be heard from, the parties and any person not a party from which discovery of the information is sought.

(2) An order governing discovery of electronically stored information may address:

- (A) whether discovery of information is reasonably likely to be sought in the

proceedings;

- (B) preservation of the information;
- (C) the form in which each type of the information is to be produced;
- (D) the time within which the information is to be produced;
- (E) the permissible scope of discovery of the information;
- (F) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;
- (G) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;
- (H) allocation of the expense of production; and
- (I) any other issue relating to the discovery of the information.

(e) *Limitation on sanctions.*

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

(f) *Request for production.*

- (1) In a civil proceeding, a party may serve on any other party a request for production of electronically stored information and for permission to inspect, copy, test or sample the information.
- (2) A party on which a request to produce electronically stored information has been served shall, in a timely manner, serve a response on the requesting party. The response must state, with respect to each item or category in the request:
 - (A) that inspection, copying, testing, or sampling of the information will be permitted as requested; or
 - (B) any objection to the request and the reasons for the objection.

(g) *Form of production.*

² Unless the parties otherwise agree or the court otherwise orders:

(1) the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably useful;

_____ (2) if necessary, the responding party shall also produce any specialized software, material, or information not ordinarily available so that the requesting party can access and use the information in its ordinarily maintained form; and

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

(h) *Limitations on discovery.*

_____ ² (1) ~~A party requesting production of electronically stored information may specify the form in which each type of electronically stored information is to be produced.~~

(2) ~~If a party responding to a request for production of electronically stored information objects to a specified form for producing the information, or if no form is specified in the request, the responding party shall state in its response the form in which it intends to produce each type of the information.~~

(3) ~~Unless the parties otherwise agree or the court otherwise orders:~~

(a) ~~if a request for production does not specify a form for producing a type of electronically stored information, the responding party shall produce the information in a form in which it is ordinarily maintained or in a form that is reasonably usable; and~~

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

- (1) A party may object to discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or expense. In its objection the party shall identify the reason for such undue burden or expense.
- (2) On motion to compel discovery or for a protective order relating to the discovery of electronically stored information, a party objecting bears the burden of showing that the information is from a source that is not reasonably accessible because of undue burden or expense.
- (3) The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.
- (4) If the court orders discovery of electronically stored information under subdivision (h)(3) it may set conditions for discovery of the information, including allocation of the expense of discovery.
- (5) The court shall limit the frequency or extent of discovery of electronically stored information, even from a source that is reasonably accessible, if the court determines that:
 - (A) it is possible to obtain the information from some other source that is more convenient, less burdensome, or less expensive;
 - (B) the discovery sought is unreasonably cumulative or duplicative;
 - (C) the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or
 - (D) the likely burden or expense of the proposed discovery outweighs the likely benefit, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(i) *Claim of privilege or protection after production.*

A claim of privilege or protection after production of electronic data under these supplemental

rules shall be governed by Rule of Civil Procedure (26)(b)(5) unless the application of that rule is modified by agreement of the parties or by order of the court.

(j) Subpoena for production.

- (1) A subpoena in a civil proceeding may require that electronically stored information be produced and that the party serving the subpoena or person acting on the party's request be permitted to inspect, copy, test, or sample the information.
- (2) Subject to subsections (j)(3) and (j)(4), subdivisions (g), (h), and (i) apply to a person responding to a subpoena under subsection (j)(1) as if that person were a party.
- (3) A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.
- (4) An order of the court requiring compliance with a subpoena issued under this rule must provide protection to a person that is neither a party nor a party's officer from undue burden or expense resulting from compliance.