

# It Isn't Just in Federal Cases, Anymore

By Todd L. Newton

Several years ago, there was a television commercial advertising Florida orange juice. As it played up the great taste and health benefits of drinking orange juice, the commercial ended with the saying, "Florida orange juice: it isn't just for breakfast anymore." In the near future, I suspect we'll all be saying something similar about the rules governing electronic discovery. Let me see if I can explain.

In December 2006, amendments to the Federal Rules of Civil Procedure went into effect covering how electronic evidence is to be dealt with in federal cases. Since that time, we've all been getting versed in the nuances of "electronically stored information," "clawback agreements," "safe harbors," and more. For those less enthusiastic about the amendments, I've often heard the following: "Those rules only apply in federal cases," and "We don't have to worry about any of that stuff in state court." As comforting as those thoughts may be for some, the reality is that electronically stored information isn't going anywhere. In fact, the statistics all point out that electronic evidence will continue to increase. Consequently, states are gearing up to deal with it, and Arkansas is no exception.

On May 27, 2007, the Arkansas Supreme Court published proposed amendments to Rule 26(b) of the Arkansas Rules of Civil Procedure and Rule 502 of the Arkansas Rules of Evidence. These companion amendments are designed to protect parties who inadvertently disclose material protected by either privilege or the work product doctrine. These amendments generally mirror their federal counterparts and are designed to provide some relief when an inadvertent disclosure of information takes place – particularly when dealing with volumes of electronic evidence. As the Reporter's Notes state, "Lawyers do their best to avoid mistakes, but they sometimes happen. Discovery has always posed the risk of the inadvertent production of privileged or protected material. The advent of electronic discovery has only increased the risk of inadvertent disclosures. This amendment addresses this risk by creating a pro-

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cedure to evaluate and address inadvertent disclosures, including disputed ones."

The amendment to Rule 26(b) adds a new paragraph (5) that specifically creates a mechanism for asserting a claim of privilege or attorney work product after the material in question has already been produced. Proposed Rule 502(e) provides that the disclosure of information covered by either the attorney-client privilege or the work-product doctrine does not waive the privilege as long as the disclosing party follows the procedure set out in Rule 26(b)(5) and the court makes the requisite findings.

So, under these rules, how do you ensure that your claim of privilege is not waived because you inadvertently disclosed privileged or protected information? First, within fourteen days of discovering the inadvertent disclosure, you must notify the opposing party by specifically identifying the material or information disclosed and asserting the privilege or doctrine protecting that material or information. Second, you must amend any responses to written discovery accordingly. The receiving party then has fourteen days after receipt of the notification to return, sequester, or destroy the materials, including copies. However, the receiving party may also challenge the claim of privilege or protection, including the timeliness of the notice or other circumstances demonstrating a valid waiver.

In determining whether a waiver has occurred, the court must consider four factors: (1) the reasonableness of the precautions that the disclosing party took to prevent inadvertent disclosure; (2) the scope of discovery; (3) the extent of disclosure; and (4) the interests of justice. It is worth noting that the first factor makes it clear that a wholesale release of information without

reasonable review to prevent an inadvertent disclosure will certainly weigh against a disclosing party's subsequent attempts to claim a privilege. In this regard, the rule specifically provides that an attorney can testify about the disclosure and the steps taken to prevent an inadvertent disclosure without having to terminate representation in the case.

At this time, these proposed amendments have not been adopted by the Arkansas Supreme Court. The deadline for comments was August 1, so we will have to wait to see how the court responds to any of the feedback concerning these amendments. However, while we wait for that decision, it makes sense to start taking steps now to ensure that should an inadvertent disclosure occur at some point, we're ready to promptly respond.

First, we should be learning now about the types of information our clients are retaining and what their record retention policies are so that we can be prepared to respond to a discovery request seeking electronically stored information. Second, we should work with our clients to quickly determine what electronically stored information may be privileged or subject to protection, including segregating that information in advance if possible to ensure that it doesn't get disclosed in the heat of the discovery process. Third, once the discovery process commences, we should keep track of the steps taken during the review of materials prior to disclosure to ensure that an inadvertent disclosure does not happen so that we can establish for the court later, if necessary, that there was no intentional waiver.

By being proactive, we can take advantage of these amendments and ensure that we don't waive any privileges. That's a good safety net to have beneath the tight rope of electronic discovery; assuming the Arkansas Supreme Court adopts these proposed amendments, this safety net won't be just for federal cases anymore. ■

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