A PRIMER ON THE NEW ELECTRONIC DISCOVERY PROVISIONS IN THE ALABAMA RULES OF CIVIL PROCEDURE

Effective February 1, 2010, the Alabama Rules of Civil Procedure were amended to provide for and accommodate electronic discovery practice. The revisions are modeled on the Federal Rules of Civil Procedure, placing Alabama in the majority of the roughly 24 states (as of this writing) that have followed the federal regimen in adopting such rules. The revisions affect Ala. R. Civ. P. 16, 26, 33, 34, 37 and 45, and a link to the revised rules and committee comments can be found at www.judicial.state.al.us.cfm. The fact that these revisions are based upon the federal model should come as no surprise in light of Alabama's handful of electronic discovery cases such as *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090 (Ala. 2007).

Whether you view these revisions as a door being held open for you or the breach of a door you have wanted held shut, these changes will affect nearly all civil practitioners, even those who never turn on a computer or intend to seek electronically stored information ("ESI") during discovery. *See, e.g.,* Ala. R. Civ. P. 45. This article is intended to summarize the changes in the rules, largely through reference to the committee comments, and will point out the significant variations from the federal rules. Though Rule 26 contains the heart of the electronic discovery provisions, this article will introduce the changes in the order in which they are likely to be encountered during litigation.

PRESERVATION OF ELECTRONICALLY STORED INFORMATION

The advent of electronic discovery did not create the concept of spoliation, which existed under the common law. *See May v. Moore*, 424 So. 2d 596, 603 (Ala. 1982). However, preserving ESI is more complicated than simply advising the client not to shred or dispose of documents pertinent to the lawsuit. The primary distinction between ESI and information stored in hardcopy is the fragility of ESI—metadata can be destroyed or altered by simply turning on a computer or opening a document for viewing. *See Cont'l Group, Inc. v. KW Prop. Mgmt., LLC*, 622 F. Supp. 2d 1357, 1373 (S.D. Fla. 2009) (discussing an employee's inadvertent alteration of metadata by accessing computer files after being on notice of impending litigation). Therefore, while many principles regarding electronic discovery are not significantly different from the age old paper discovery, the consequences of failing to meet the burden to preserve evidence can be substantial.

The rules do not demand perfect steps to preserve digital evidence. Only reasonable steps are required, as seen by the "safe harbor" of Alabama Rules of Civil Procedure 37(g): "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." In other words, if information is lost pursuant to the party's regular document maintenance and destruction process, such a loss is generally not sanctionable if the loss of evidence is in good faith. Examples of sanctionable and non-sanctionable loss of data, respectively, can be seen in *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D. N.Y. 2004) and *Calixto v. Watson Bowman Acme Corp.*,

2009 WL 3823390 (S.D. Fla. Nov. 18, 2009). However, once litigation is anticipated, a party must generally disrupt its regular document destruction routine to receive the protection of the safe harbor provision of Ala. R. Civ. P. 37(g). See Committee Comments to Adoption of Ala. R. Civ. P. 37(g).

Although Rule 37(g) is identical to its federal counterpart, it may end up being interpreted quite differently. The committee comments contain a statement that strays from traditional spoliation jurisprudence. "Good faith requires that a party not exploit the routine operation of its computer system. For example, *a party may not adopt a short record-retention period with no legitimate business purpose in order to thwart discovery of harmful information by having its computer system overwrite the information.*" Committee Comments to Adoption of Rule 37(g) (emphasis added). This is a stark statement—essentially, this comment indicates that parties can be sanctioned for a document destruction routine that is deemed not to preserve evidence for a sufficient duration of time. This comment is consistent with an unusual case in Utah that interprets Federal Rule of Civil Procedure 37(g) as implicitly including a reasonableness standard in the "good faith operation of an electronic information system" before Rule 37(g) provides any safe harbor protection. *See Phillip M. Adams & Assoc., LLC v. Dell*, 2009 WL 910801 (D. Utah Mar. 30, 2009) (refusing to extend safe harbor protections to a party that destroyed documents pursuant to its "unreasonable" document destruction regimen six years before litigation was filed). Against that backdrop, the import of this comment and its effect on the interpretation of Alabama Rule of Civil Procedure 37(g) are unknown.

THE RULE 26(f) CONFERENCE

Perhaps the most obvious difference between the Alabama revisions and the federal rules is the continued view that any parties' planning meeting is ordinarily voluntary in Alabama, rather than required as under the federal rules. See Ala. R. Civ. P. 26(f). Clearly, most cases in state court do not involve electronic discovery. While the mandatory parties' planning meeting under FRCP 26(f) *must* consider and, if needed, address electronic discovery, the revisions to the Alabama rules simply *encourage* the parties to engage in such discussions. Realizing that the majority of lawsuits filed in state court will never involve electronic discovery, the rules committee opted not to burden the majority of cases with the exercise if it is not needed. However, Rule 26(f) allows the court to order a planning conference to address, inter alia, electronic discovery if the court anticipates issues regarding electronic discovery in the case. If ordered, the conference is obviously mandatory. The Committee Comments to Rule 26(f) suggest discussion topics for the parties' planning meeting, including the computer systems that will be encountered, the parties' respective search capabilities, the discovery plan, the types and time period of information to be sought, and the form of production. *See also* the U.S. Dist. Ct. for the Dist. of Maryland's "Suggested Protocol for Discovery of Electronically Stored Information." www.mdd.uscourts.gov/news/news/ESIProtocol.pdf The rules also specifically point out that the discussion should consider the business interruption experienced by the parties resulting from litigation and electronic discovery.

REQUESTING ELECTRONICALLY STORED INFORMATION

As with traditional requests for production, requests for ESI fall within Rule 34. When formulating requests for ESI, a party may specify the form in which it is to be produced, whether on paper, in static images (such as PDF), in native format (e.g., an Excel spreadsheet), etc. The amendment to Rule 34 recognizes that, under some circumstances, inspection or testing of the responding party's data may be needed, either by way of testing search results or running test queries in a database. *See* Committee Comments to Amendment to Rule 34. In such circumstances, the court should address privacy and confidentiality concerns given the intrusiveness of allowing an opposing party such invasive access.

It is highly recommended that attorneys specify the form of production sought in Rule 34 requests. Failure to specify the form of production allows the responding party to determine the form of production as long as the form selected can be justified as reasonable under the circumstances or is in the form in which the information is ordinarily stored by the producing party. A party that fails to specify the form of production sought will generally not be successful in compelling the responding party to later produce the same discovery in a different form unless the requesting party can show that the form of production chosen by the responding party was unreasonable. *See Aguilar v. Immigration & Customs Enforcement*, 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008). Moreover, the comments clearly provide that "[w]hether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced only in one form." Committee Comments to Amendment to Rule 34.

Ala. R. Civ. P. 33(c), regarding interrogatories, has also been amended to allow parties to respond to interrogatories by simply directing the requesting party to ESI being produced. Ala.R.Civ.P. 33(c). However, the comments warn that any burden imposed on the requesting party to obtain the answer from the ESI produced must not be "substantially greater" than the burden would be on the responding party to simply answer the interrogatory. Rather than expressly adopting the comments to FRCP 33, the comments to Ala. R. Civ. P. 33(c) merely call the federal comments "instructive" and note that they "provide practical guidance." Having stopped short of adopting the federal comments to the rule's counterpart in FRCP 33(d), the federal case law regarding electronic discovery may be less persuasive than in the case of other rules.

RESPONDING TO REQUESTS FOR ELECTRONICALLY STORED INFORMATION

The provisions for responding to requests for ESI are perhaps the most complicated of the amendments. Upon receiving a Rule 34 request, the responding party should make two determinations. First, is the information sought reasonably accessible or not reasonably accessible? Second, in what form does the party propose to respond to the request? Rule 34 and its comments contemplate some measure of cooperation between the requesting party and the responding party in formulating acceptable answers to these questions.

Rule 34(b) requires the responding party to produce responsive, non-protected ESI that is "reasonably accessible." Whether ESI is reasonably accessible is often subject to debate, and depends upon a myriad of factors that are case specific and are changing as search and retrieval technologies improve. For example, information on back-up tapes may not be reasonably accessible to a small company, but such media may be reasonably accessible to a larger operation that has indexing and search capabilities for its back-up tapes.

The responding party is not responsible, at least initially, for producing ESI that is "not reasonably accessible." Such information often includes back-up tapes and legacy systems (information on computers that are no longer used and may rely upon obsolete software or software that no one at the company remembers how to use). Under ordinary circumstances, the responding party does not need to produce such ESI, but must, subject to Rule 11, identify the information as being not reasonably accessible due to undue burden or cost. The party declaring the ESI to be not reasonably accessible bears the burden of showing that producing the data would be unduly burdensome and costly. A determination of whether the ESI is reasonably accessible can be sought by either party.

If the court agrees that the ESI is not reasonably accessible, then it need not be produced "unless the requesting party shows good cause for compelling the discovery, considering the factors set forth in" Rule 26(b)(2)(B). Among the most important factors for the court to consider in determining whether to compel the production of ESI that is not reasonably accessible is "that the discovery is unduly burdensome or expensive, taking into account 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." Ala. R. Civ. P. 26(b)(2)(B). Under the federal rules, issues regarding the compelled production of not reasonably accessible ESI are increasingly determined by a proportionality analysis. Another resolution of such disputes is to shift to the requesting party some amount of the burden of production of ESI that is not reasonable accessible. *See, e.g., Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (applying factors set out in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003)).

INADVERTENT DISCLOSURE OF PRIVILEGED MATERIAL

The volume of information that must be cultivated and reviewed presents increasingly greater challenges within the time table of litigation. The reality of electronic discovery is that in many cases, the attorneys cannot lay eyes upon every single document produced.

Rule 26(b)(6)(B) addresses the inadvertent disclosure of privileged materials, and sets out the duties of both the producing party and the receiving party. Rule 26(b)(6)(B) differs from its federal counterpart, FRCP 26(b)(5)(B), in that the Alabama rule specifically provides that either the producing party or the receiving party may disclose the disputed material to the court to seek a determination of the claim that it is protected, whereas the federal rule only provides for disclosure to the court by the receiving party. The comments

to Rule 26(b)(6)(B) adopt the comments to FRCP 26(b)(5)(B), with two additional statements. First, a party's notice of inadvertent production of privileged information must include "the factual and legal basis for the claim [of privilege and that disclosure was inadvertent]." Second, "the parties are reminded that" a reasonable belief, subject to Rule 11, is required for the assertion of privilege.

The Committee Comments to the Amendment to Rule 16 explain that agreements regarding the waiver (or, more precisely, nonwaiver) of privilege through inadvertent production contemplated by the rules are quickpeeks and clawback agreements. Though rarely used (for predictable reasons), a quickpeek agreement provides for the parties to simply provide, without prior privilege review, a certain type or defined block of documents for the requesting party to review before crafting its Rule 34 requests. A clawback agreement, which has grown much more popular, provides for a regimen by which a party can recover inadvertently produced documents which the producing party claims are privileged. Quickpeeks and clawbacks can apply to paper discovery as well as electronic discovery. These agreements can be incorporated into the court's scheduling order (which is generally recommended). *See Ala.R.Civ.P. 16(b)(6)*. If a party seeks the court's assistance in resolving a dispute regarding privileged documents, any agreement of the parties that was incorporated into an order pursuant to Rule 16 is generally controlling rather than the procedure found in Rule 26(b)(6)(B). *See* Committee Comments to the Amendment to Rule 16. The comments, vis a vis their adoption of the comments to the federal counterpart to ARCP 26(b)(6)(B), point out that the rule is procedural and provides no substantive guidance as to whether a waiver of privilege has occurred.

NON-PARTY SUBPOENAS

Rule 45, regarding subpoenas to non-parties, has also been revised. The rule now contemplates a party's request to a non-party for ESI, as well as a non-party's response to a subpoena that implicates ESI (whether or not requested or specified by the requesting party, which is why attorneys not intending to implicate the new electronic discovery rules may do so inadvertently). Rule 45(a)(1)(D) states that "[a] subpoena may specify the form or forms in which [ESI] is to be produced." Furthermore, Rule 45 is amended throughout to provide for "copying, testing, or sampling" of the non-party's information, requests often associated with ESI. Rule 45(c), containing the provisions regarding the protection of non-parties, contains the same references to "testing and sampling" as the rest of Rule 45, but also allows a non-party responding to a subpoena to object to the form of production specified by the requesting party. *See* Rule 45(c)(2)(B).

The duties of the responding party, set out in Rule 45(d), are similar to a party's duties in responding to a request for ESI with regard to the form of production. That is, if the requesting party does not specify the form of production for ESI, then the responding party must produce the information "in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable." Rule 45(d)(3). Furthermore, Rule 45(d)(4) also states that "[a] person responding to a subpoena need not produce the same electronically stored information in more than one form," just as is provided by Rule

34(b)(ii).

The regimen for addressing a non-party's production of not reasonably accessible ESI is similar to the process among parties: the responding non-party has the burden of showing, on a motion to compel or to quash, "that the information is not reasonably accessible because of undue burden or cost." Rule 45(d)(5). If the non-party demonstrates that the ESI is not reasonably accessible, then the responding non-party is ordinarily protected from producing the information unless good cause for ordering the production is demonstrated by the producing party, "considering the limitations of Rule 26(b)(2)(B)." *Id.* "The court may specify conditions regarding the production of the discovery," and such conditions certainly can include cost shifting of the expense of production to the requesting party. A non-party's inadvertent production of privileged information is addressed in the same manner as provided in Rule 26(f) regarding the inadvertent production of privileged information by a party. The Committee Comments to Amendment to Rule 45 contain Form 51K, which updates the suggested form for a civil subpoena to alert the responding non-party to their duties and protections regarding the production of ESI.

CONCLUSION

These changes to the Alabama Rules of Civil Procedure are based largely, though not entirely, on the corresponding provisions of the Federal Rules of Civil Procedure. However, there are some notable differences. The committee comments are of tremendous benefit, and their review is strongly encouraged, beginning with the comments to Rule 26, which serves as the foundation for all other rule changes, as indicated by the fact that the committee comments to several other rules refer to it as the starting point for applying the revised rules. The more developed federal jurisprudence will be persuasive authority for interpreting most (though probably not all) of the state electronic discovery provisions, and will provide the logical starting point for the resolution of disputes regarding electronic discovery.