Alabama Rules of Civil Procedure

V. DEPOSITIONS AND DISCOVERY

Rule 26.

General provisions governing discovery.

(a) *Discovery methods*. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(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. 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.

(2) LIMITATIONS.

(A) A party need not provide discovery of electronically stored information from sources that the party identifies to the requesting party 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 discovery from such sources if the requesting party shows good cause for compelling the discovery, considering the limitations of subdivision (b)(2)(B) of this rule. The court may specify conditions for such discovery.

(B) The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines: (i) that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) that the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) 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. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(3) INSURANCE AGREEMENTS. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(4) TRIAL PREPARATION: MATERIALS. Subject to the provisions of subdivision (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) TRIAL PREPARATION: EXPERTS. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

> (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the

expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(5)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained, specially employed or assigned by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(5)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL-PREPARATION MATERIALS.

(A) When a party withholds information otherwise discoverable under these rules on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and, upon written request by any other party, shall be supported by a description of the nature of the documents, communications, or things not produced sufficient to enable the demanding party to contest the claim. This supporting description shall be served within twenty-one (21) days of the date a request is served, unless otherwise ordered.

(B) If information is 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 and may not use or disclose the information until the claim is resolved. Either 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.

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or, alternatively, on matters relating to a deposition or production or inspection, the court in the circuit where the deposition or production or inspection is to be taken may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place for the discovery; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court. A motion for a protective order shall be accompanied by a statement of the attorney for the moving party stating that the attorney, before filing the motion, has endeavored to resolve the subject of the discovery motion through correspondence or discussions with opposing counsel or, if the opposing party is not represented by counsel, with the opposing party.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and timing of discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert witness is expected to testify, and the substance of the witness's testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party (A) knows that the response was incorrect when made, or (B) knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) *Discovery conference*. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. If discovery of electronically stored information will be sought, any party may request, or the court may on its own order, that the parties confer regarding any issues relating to discovery of electronically stored information, including issues relating to preserving discoverable information; issues relating to the form or forms in which the electronically stored information should be produced; and issues relating to claims of privilege or of protection of material as trial-preparation material, including, if the parties agree on a procedure to assert such claims after production of the material, whether to ask the court to include their agreement in an order. Following the discovery conference, the court may enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

(dc) *District court rule*. Rule 26 applies in the district courts except that the reference to physical and mental examinations is deleted and all other discovery methods referred to in Rule 26(a) shall be available only in the discretion of the court on motion of the party seeking such discovery or by agreement of the parties. Unless the parties agree otherwise, in no event shall the court order a deposition on oral examination or on written questions except when the witness will not be available to testify at the trial.

[Amended eff. 8-1-92; Amended eff. 10-1-95; Amended eff. 8-1-2004; Amended 11-4-2009, eff.2-1-2-10.]

Committee Comments on 1973 Adoption

Subdivision (a): This is a general statement of the various discovery devices available and treated within Rules 26 through 37. Their frequency of use can be limited only by court order. See Rule 26(c).

Subdivision (b): The scope of discovery is treated in general and with particularity as to Insurance, Trial Preparation: Materials, and Trial Preparations: Experts. Subparagraph (1) sets the general tone. The broad scope of examination encompasses matters inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the presentation of his case. *Engl v. Aetna Life Ins. Co.,* 139 F.2d 469 (2d Cir.1943). In simplest parlance, it was, at an early date, held that discovery cannot be defeated by a cry of "fishing expedition." *Laverett v. Continental Briar Pipe Co.,* 25 F.Supp. 80, 82 (D.C.N.Y.1938). This standard compares favorably with Tit. 7, § 474(2), Code of Ala., applicable to depositions upon oral examination, and said section was entitled to broad and liberal treatment in *Ex parte Cypress*, 275 Ala. 563, 156 So.2d 916 (1963). Of course, rules of privilege apply with equal force to discovery as well as trial. *U.S. v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953); *Southern Railway v. Lanham*, 403 F.2d 119, 134 (5th Cir.1968), rehearing denied, 408 F.2d 348 (5th Cir.1969), Wright & Miller, *Federal Practice and Procedure, Civil*, § 2007 (1970).

Subdivision (b)(2): Before Rule 26 was amended by the Supreme Court in 1970, permitting pretrial discovery of insurance coverage under Rule 26(b)(2), there was a wide diversity of opinion among both the Federal District Courts and the State Courts on the subject. Wright & Miller, *Federal Practice and Procedure, Civil*, § 2010 (1970). The pros and cons of the argument are set forth with clarity in Davis' article, *Pretrial Discovery of Insurance Coverage*, 16 Wayne L.Rev. 1047, 1053-55, as follows:

> "Courts allowing discovery of insurance coverage generally do so for one or more of the following reasons: (a) A defendant's insurance coverage is relevant to the subject matter of the total lawsuit, (b) the procedural rules are construed to secure the just, speedy, and inexpensive determination of every action; (c) the broad policy of modern day discovery is open and frank disclosure; (d) a defendant's insurance company is intimately connected with the lawsuit and more than just an interested party; (e) most states require automobile liability insurance and it is an asset existing only for such eventuality as the litigation in which defendant finds himself; and, most importantly, (f) fair and just settlements will be fostered, protracted litigation will be avoided, calendar congestion will be alleviated, and secrets, mysteries and surprises will be eliminated. Occasionally courts allow discovery for other reasons. Among them are: Uniformity of decision will discourage forum shopping; the plaintiff has a third-party beneficiary interest in the policy giving him a 'discoverable interest,' or because the provisions of the insurance policy may themselves be relevant to proof of liability.

> "On the other hand, grounds relied upon by courts denying discovery are: (a) Insurance coverage is not relevant in the pretrial stage of litigation; (b) a liability insurance policy is an asset of the defendant, and assets are not discoverable until and if post-judgment proceedings are reached; (c) the rules do not specifically provide for insurance coverage discovery; (d) discovery of high policy limits could render settlement more difficult just as easily as the converse could facilitate settlement; and (c) the fact of insurance is not admissible at trial and its discovery cannot reasonably lead to the discovery of admissible evidence. Some of the less persuasive reasons advanced for refusing discovery are: It is not for the trial courts but for the supreme court by rule or the legislature by statute to declare insurance policy limits discoverable, allowing discovery would invade the defendant's or insurer's right to privacy; and compromise settlement is not the aim of the discovery rules."

After thorough consideration, the committee has not recommended that the limits of insurance be subject to discovery.

Subdivision (b)(3): In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), a landmark decision, the Court was confronted with the applicability of the venerated attorney-client privilege to all of the information assembled by the attorney while preparing his case. While refusing to apply the attorney-client privilege to a lawyer's entire files and mental impressions, the court, on the other hand, was unwilling to make discovery proper in all instances. Defining the delicate balance between the equally undesirable extremes of full disclosure and no disclosure has provoked great uncertainty. This subdivision seeks to lay the ground rules for striking the balance.

Federal Rule 26(b)(3) has been described as an accurate codification of *Hickman*, supra, and later cases in the lower courts. Wright & Miller, *Federal Practice & Procedure, Civil*, § 2023 (1970). This subparagraph: (1) defines the class of materials that are given protection as work product, (2) sets out the showing (substantial need and undue hardship) required to obtain discovery of work product material, (3) gives absolute protection to an attorney's mental impressions, legal theories, and the like, (4) allows a party to obtain a copy of his own statement without a special showing, and (5) creates machinery by which a person not a party to the litigation who has given a statement concerning the action, may obtain a copy of his own statement. The rule of *Hickman*, supra, is no stranger to Alabama, having been recognized and applied in *Ex parte Alabama Power Co.*, 280 Ala. 586, 196 So.2d 702 (1967).

Subdivision (b)(4): Discovery of experts has, at various times, been argued to be barred by privilege, work product or the fundamental unfairness in a

silver platter presentation of often costly information. On the other hand, the decisive nature of expert testimony in many actions and the concomitant need for adequate pretrial preparation with respect to expert testimony has lent support to the discoverability of experts' information. This provision permits discovery and, as in Rule 26(b)(3), seeks to strike a balance between full discovery and no discovery at all. It is more easily comprehensible if the following categories of experts are noted:

(1) Experts a party expects to use at trial. Opposing parties are entitled, without cost, to secure answers to interrogatories containing the identity of these experts and the substance of the facts and opinions upon which they are expected to testify. Further discovery can be had upon motion, the granting of which would depend upon a showing of the inadequacy of the answers to interrogatories. If further discovery is permitted, fees and expenses can be demanded of the party seeking discovery.

(2) Experts retained specially employed or assigned in anticipation of litigation and preparation for trial but not expected to be used at trial. First note that this does not cover an expert who is an actor or viewer who was therefore not preparing for trial when his expertise came to bear upon the transaction or occurrence made the basis of the action. The facts and opinions of actors or viewers are discoverable just as any other witness under Rule 26(b)(2). The facts and opinions of the expert not to be used at trial, although engaged in preparation, can only be had upon a showing of exceptional circumstances. By way of example, exceptional circumstance might exist when such an expert has conducted a destructive test on evidence in the action. See *Colden v. R.J. Schofield Motors*, 14 F.R.D. 521 (N.D.Ohio 1952).

(3) Experts informally consulted in preparation for trial but not retained. No discovery of the identity or views of these experts can be had. Presumably, by way of example, counsel's unsuccessful efforts to retain a nationally known consumer protection advocate would not be subject to discovery.

(4) Experts whose information was not obtained in preparation for trial. As noted in (2) above, these actors or viewers are subject to discovery as with an ordinary witness. For example, consider the status of a defendant architect in a malpractice action.

This rule differs in that it broadens F.R. 26(b)(4)(B) to include general employees who are used in anticipation of litigation. Under F.R. 26(b)(4), a general employee, not an actor or viewer and called into the case after litigation commences arguably qualifies neither as an ordinary witness nor as any previously noted kind of expert witness and could arguably be exempt from discovery.

Finally, discovery on motion after inadequate interrogatory answers will be subject to fees being paid for the time involved in responding to additional discovery, and may be subject to payment of a part of the experts total fees. Discovery on motion in the remaining instances will be subject to both categories of fees referred to above.

Subdivision (c): Protective Orders. Formerly Rule 30(b), F.R.C.P., this provision is applicable to all forms of discovery and reaches objections as to time as well as place and further, provides a remedy against undue burden or expense. See Wright & Miller, *Federal Practice and Procedure, Civil*, § 2035 (1970). Also, this section authorizes the Judge in which the action is pending or where the discovery is taking place to grant relief.

Subdivision (d): Sequence and Timing of Discovery. This section permits simultaneous discovery by all parties unless the Court expressly orders one party to refrain from discovery until conclusion of discovery by another party. This prevents the imposition of priorities save only in most unusual circumstances.

Subdivision (e): Supplementation of Responses. Rule 26(e) is also new to both Alabama and federal practice. The rule does not impose the impracticable burden of a continuing check by the attorney upon the accuracy of all responses previously given by his client. It requires supplementation only in two situations where after-acquired information is of great importance and is particularly likely to come to the attorney's attention. These situations arise when new information about witnesses or new information which to the party's knowledge makes a prior answer incorrect is acquired. Paragraph (3) also imposes a duty to supplement if so ordered or agreed or upon a new discovery request. Although there is no express sanction provision for Rule 26(e), the federal Advisory Committee's Note states that the "Duty will normally be enforced, in those limited instances where it is imposed, through sanctions imposed by the trial court, including exclusion of evidence, continuance, or other action, as the Court may deem appropriate." 48 F.R.D. 487, 508.

Committee Comments to August 1, 1992,
Amendment to Rule 26(b)(2)

The Alabama legislature amended Alabama Code 1975, § 32-7-23, effective January 1, 1985, to create underinsured motorist coverage. That statutory amendment has generated much litigation and many appellate decisions. See R. Davenport, *Underinsured Motorist Coverage—Where Did It Come From Where Is It Going*, 49 Ala.Law. 284 (1988), and *Underinsured*

Motorist Coverage—An Update, 50 Ala.Law. 307 (1989). In particular, *Lowe v. Nationwide Insurance Co.*, 521 So.2d 1309 (Ala.1988), provides several procedural options to the underinsured carrier and the insured (the plaintiff in the tort action). Without knowing the defendant's policy limits, the plaintiff cannot make intelligent decisions as to whether or when to give notice or to join the carrier of underinsured motorist coverage, and the carrier cannot know whether to participate or to withdraw from the litigation. The original committee comments explain that the limits of liability insurance were shielded from discovery in order to better facilitate settlement. However, in the context of underinsured motorist coverage, the original rule actually made settlement much more difficult. If the defendant disputes that underinsured motorist coverage is likely to come into play under the facts and the injuries alleged, the trial court should liberally construe any uncertainties in favor of disclosure if the goal of facilitation of settlement is to be attained.

Committee Comments to August 1, 1992,
Amendment to Rule 26(c)

The portion of the first paragraph requiring a statement of the attorney for the moving party was added so as to require all attorneys to confer with opposing counsel before moving for a protective order. The committee hopes that most discovery disputes will be resolved between counsel without resort to provisions regarding protective orders.

Committee Comments to October 1, 1995,
Amendment to Rule 26

Subdivision (a). This amendment conforms this subdivision to F.R.Civ.P. 26(a) as it existed before the 1993 amendments to F.R.Civ.P. 26. It drops the invitation to abusive discovery contained in the last sentence of the former rule, which referred to the unlimited use of various discovery methods.

Subdivision (b). This amendment conforms this subdivision to F.R.Civ.P. 26(b) as it existed before the 1993 amendments to F.R.Civ.P. 26. The revised rule authorizes restrictions on the frequency and extent of use of discovery methods. It also makes insurance agreements generally discoverable.

Subdivision (f). This subdivision is substantially different from the present version of F.R.Civ.P. 26(f) or from F.R.Civ.P. 26(f) as it existed before the 1993 amendments to F.R.Civ.P. 26.

Committee Comments to Adoption of Rule 26(b)(5)
Effective August 1, 2004

This amendment adds subdivision (b)(5) by adopting similar language from existing Rule 45(d)(2). Rule 26(b)(5), Fed.R.Civ.P., effective December 1, 1993, covers the same subject matter, but with slightly different wording.

A party must provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection. Although the person from whom discovery is sought decides whether to claim a privilege or protection, the court ultimately decides whether, if this claim is challenged, the privilege or protection applies. Providing information pertinent to the applicability of the privilege or protection should reduce the need for in camera examination of documents.

The Rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work-product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items, etc., can be described by categories. It is not intended that an exhaustive “privilege log” or a similarly detailed document be prepared in every case. The parties and the court should take into account the practical considerations listed in Rule 26(b)(1)(iii).

Committee Comments to Amendment to Rule 26
Effective February 1, 2010

1. Introduction

The amendment to Rule 26 is a part of the comprehensive revisions to Rules 16, 26, 33(c), 34, 37, and 45 to accommodate the discovery of electronically stored information ("ESI"). The 2006 amendments to the Federal Rules of Civil Procedure ("FRCP") and the FRCP Advisory Committee Notes served as the Committee's benchmark, although many sources were consulted, including caselaw and the Uniform Rules Relating to Discovery of Electronically Stored Information published by the National Conference of Commissioners on Uniform State Laws. These Committee Comments quote many of the Federal Advisory Committee Notes to the 2006 amendments to the FRCP at length, but there are additional Federal Advisory Committee Notes, not quoted here, that should also be consulted.

Rule 26(b)(2) now provides a two-tiered procedure for the discovery of ESI; subdivision 26(b)(6)(B) provides a procedure to be followed in the event that a party asserts that privileged or protected documents were inadvertently produced; and subdivision 26(f) invites parties to agree, and permits the court to order the parties to meet and confer, regarding ESI issues early in the discovery process if such discovery will be sought.

2. Rule 26(b)(2): Two-Tiered Discovery of ESI

Rule 26(b)(2) provides a two-tiered procedure for discovery of ESI. First, the producing party produces information from reasonably accessible sources, which may include a challenge by the requesting party and a ruling by the court regarding what sources are reasonably accessible. The second tier is invoked if the requesting party seeks discovery of information from sources that are not reasonably accessible, which would include a ruling by the court as to whether the requesting party has shown good cause for compelling the discovery.

Rule 26(b)(2) is not changed regarding production of ESI that is readily accessible. Such discovery is subject to the existing provisions of the Alabama Rules of Civil Procedure. However, ESI that is not reasonably accessible need not be produced initially. Rather, the responding party must identify the sources of ESI that are not reasonably accessible. The Alabama amendment varies slightly from the FRCP to make clear that the requesting party is the one to whom these sources of ESI should be identified.

ESI is not reasonably accessible if its production from the identified source would be unduly burdensome and costly. The responding party must act in good faith under Rule 11 in so designating a source of ESI.

If the parties are unable to agree after meeting and conferring that information from a source designated as "not reasonably accessible" is in fact not reasonably accessible, a motion to compel or a motion for a protective order may be filed. In either event the responding party has the burden to show that producing data from such source would be unduly burdensome and costly. If the responding party fails to carry this burden, the data should be produced under and subject to the existing rules applicable to all discovery.

If the court determines that the information is not reasonably accessible, the information need not be produced unless the requesting party shows good cause for compelling the discovery, considering the factors set forth in subsection (b)(2)(B) of this rule. Moreover, if the court finds good cause, it may condition the discovery as appropriate (e.g., impose limits on the volume of information to be searched for and/or the sources of information to be searched, as well as the payment by the requesting party of all or part of the costs incurred in obtaining the information).

Adding subsection (b)(2)(A) to Rule 26 required changing the lettering/numbering system in the rest of Rule 26(b).

The FRCP Advisory Committee Notes to Rule 26 provide a succinct and practical aid in understanding the need for, and the interpretation of, the new provisions of Alabama Rule 26(b)(2)(A), and they are, accordingly, adopted by the committee as follows:

> "The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.
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> "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) [Ala. R. Civ. P. 26(b)(2)(A)] is added to regulate discovery from such sources.
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> "Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) [Ala. R. Civ. P. 26(b)(2)(B)] limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.
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> "A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not

reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

"The volume of – and the ability to search – much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

"If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

"Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause considering the limitations of Rule 26(b)(2)(C) [Ala. R. Civ. P. 26(b)(2)(B)] that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the

discovery request; (2) the quantity of information available from other more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

"The responding party has the burden as to one aspect of the inquiry – whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery consistent with the limitations of Rule 26(b)(2)(C) [Ala. R. Civ. P. 26(b)(2)(B)], through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

"The good-cause inquiry and consideration of the Rule 26(b)(2)(C) [Ala. R. Civ. P. 26(b)(2)(B)] limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

> "The limitations of Rule 26(b)(2)(C) [Ala. R. Civ. P. 26(b)(2)(B)] continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources."

3. Rule 26(b)(6)(B): Inadvertent Production and Waiver

Subdivision (b)(6)(B) has been added. Nonelectronic discovery practice sometimes includes the production of tens of thousands of documents, which presents a substantial risk that privileged or protected documents may be inadvertently produced even after a reasonable and time-consuming pre-production review, which, in turn, adds to the cost and delay of discovery. Discovery of ESI can present even more of a challenge. New subdivision (b)(6)(B), therefore, provides a procedure to assert a claim of attorney-client privilege or work-product protection after production. The change is applicable to both non-ESI and ESI data, but, of course, is procedural and does not address substantive waiver law.

Here again, the FRCP Advisory Committee Notes are instructive and are adopted with two additional comments. First, the notice provided by the party claiming the privilege or protection should include the factual and legal basis for the claim. Second, the parties are reminded that they are subject to Rule 11 and its sanctions if a claim of privilege or protection is asserted without reasonable belief that there is good ground to assert the claim. With these additions, the FRCP Advisory Committee Notes are adopted, as follows:

> "Rule 26(b)(5)(B) [Ala. R. Civ. P. 26(b)(6)(B)] does not address whether the privilege or protection that is asserted after production was waived by the production .... Rule 26(b)(5)(B) [Ala. R. Civ. P. 26(b)(6)(B)] provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) [Ala. R. Civ. P. 26(b)(6)(B)] works in tandem with Rule 26(f), which is amended to <u>direct</u> [in Ala. R. Civ. P. 26(b)(6)(B), this word has been changed to 'invite'] the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) [Ala. R. Civ. P. 26(f)] and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B) [Ala. R. Civ. P. 26(b)(6)(B)].
>
> "A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in

writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

"After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

"If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

"Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A) [Ala. R. Civ. P. 26(b)(6)(A)], there may be no ruling if the other parties do not contest the claim."

4. 26(f): Discovery Conference

Unlike its federal counterpart, Ala. R. Civ. P. 26(f) does not mandate a meeting of the parties to confer and consider ESI or other issues, and the amendment to subdivision (f) does not alter current Alabama practice. As noted in the Committee Comments to Rule 26(b)(6), the court and parties should address ESI discovery issues at a discovery conference or otherwise only in those cases in which such an effort would be productive and necessary. Rule 26(f) does, however, advise that the court or any party may raise any issue regarding discovery or preservation of ESI if such discovery will be sought.

The new provision lists some common issues in discovery of ESI, which should be dealt with at or before the commencement of discovery. For example the parties may need to discuss: the computer systems utilized and their capabilities in order to develop a discovery plan tailored for the specific ESI issues of the particular case; the categories of information sought and the period for which such information is sought; the various sources of the information sought and whether the information is reasonably accessible from such sources; and the form or forms in which the ESI is stored and will be produced.

Any issues regarding preservation of discoverable information should be discussed with a view toward striking a balance between preserving relevant evidence and the parties' needs to continue the routine operation of their computer systems as a part of their ongoing business activities. However, the suggestion that the parties should address preservation issues does not, as the FRCP Advisory Committee Note to Rule 26(f) indicates, "imply that courts should routinely enter preservation orders. A preservation order entered over objection should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances."

As noted in the Committee Comments regarding Rule 16(b)(6), agreements regarding procedures for asserting claims of privilege or protection after discovery has been produced and for entering nonwaiver agreements may reduce delays and lessen the cost of discovery. Such agreements are particularly appropriate in connection with the production of ESI. As noted by the FRCP Advisory Committee Notes to Rule 26(f):

> "These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter

(sometimes referred to as 'embedded data' or 'embedded edits') in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called 'metadata') is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

"Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection -– sometimes known as 'quick peek.' The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A) [Ala. R. Civ. P. 26(b)(6)(A)]. On other occasions, parties enter agreements – sometimes called 'clawback agreements' – that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial–preparation material.

"Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process."

In reaching any agreement regarding the production of electronic information, and in particular metadata, the parties should be cognizant of an ethics opinion (Alabama State Bar Office of General Counsel Opinion Number: 2007-02), which concludes that: (i) the producing party must use reasonable care to prevent the disclosure of metadata that contains information protected by the attorney-client privilege or the work product doctrine and (ii) to the extent

proscribed by the opinion, it is unethical for the receiving party to "mine" for metadata.

District Court Committee Comments

The Advisory Committee has concluded that only very limited discovery should be available in the district court. Of course, the parties may by agreement indulge in the full breadth of discovery available in circuit courts under the Alabama Rules of Civil Procedure. However, absent agreement, discovery is available only on court order within the limits upon the court's authority to order discovery as are set forth in Rule 26(dc). It is the recommendation of the Advisory Committee that such discovery as is permitted by the court in its discretion be kept to a minimum in each case. When review of motions seeking discovery in cases of more than minimal jurisdictional amount proves to be unduly burdensome on the court's time, a standing order permitting a limited number of interrogatories or requests for admissions could be imposed by local rule for cases having an amount in controversy over a designated limit.

Note from the reporter of decisions: The order amending Rules 4, 4.1, 4.2, 4.3, 4.4, 6(a), 7(b)(2), 17(a), 22(c), and 26(b), Alabama Rules of Civil Procedure, effective August 1, 2004, is published in that volume of *Alabama Reporter* that contains Alabama cases from 867 So.2d.

Note from the reporter of decisions: The order amending, effective February 1, 2010, Rule 16, Rule 26, Rule 33(c), Rule 34, Rule 45, and Form 51A, and adopting effective February 1, 2010, Rule 37(g) and the Committee Comments to Amendment to Rule 16 Effective February 1, 2010, the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, the Committee Comments to Amendment to Rule 33(c) Effective February 1, 2010, the Committee Comments to Amendment to Rule 34 Effective February 1, 2010, the Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010, and the Committee Comments to Amendment to Rule 45 Effective February 1, 2010, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.