IN THE SUPREME COURT OF ALABAMA
December 21, 2018

ORDER

IT IS ORDERED that Rule 26(b)(1), Rule 26(b)(2), Rule 26(c), and Rule 37(g), Alabama Rules of Civil Procedure, be amended to read in accordance with Appendices A, B, D, and F, respectively, to this order and that the Committee Comments to the amendments to Rule 26(b)(1) and Rule 26(b)(2), Rule 26(c), and Rule 37(g) be adopted to read in accordance with Appendices C, E, and G, respectively, to this order;

IT IS FURTHER ORDERED that the amendments of Rule 26(b)(1), Rule 26(b)(2), Rule 26(c), and Rule 37(g) and the adoption of the Committee Comments to the amendments to Rule 26(b)(1) and Rule 26(b)(2), Rule 26(c), and Rule 37(g) are effective immediately;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 26 and Rule 37:

> "Note from the reporter of decisions: The order amending Rule 26(b)(1), Rule 26(b)(2), Rule 26(c), and Rule 37(g) and adopting the Committee Comments to the amendments to Rule 26(b)(1) and Rule 26(b)(2), Rule 26(c), and Rule 37(g) Effective December 21, 2018, is published in that volume of Alabama Reporter that contains Alabama cases from ___ So. 3d."

Stuart, C.J., and Bolin, Parker, Shaw, Main, Wise, Bryan, Sellers, and Mendheim, JJ., concur.

Witness my hand this 21th day of December, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

FILED
December 21, 2018
9:25 am
Clerk
Supreme Court of Alabama

APPENDIX A

Rule 26(b)(1), Alabama Rules of Civil Procedure

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is: (i) 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; and (ii) proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. 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.

APPENDIX B

Rule 26(b)(2), Alabama Rules of Civil Procedure

(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 proposed discovery is outside the scope permitted by Rule 26(b)(1). The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

APPENDIX C

Committee Comments to Amendment to Rule 26(b)(1) and Rule 26(b)(2) Effective December 21, 2018

Rule 26 is amended to incorporate proportionality into the definition of the scope of discovery in Rule 26(b)(1), paralleling most of the changes made on December 1, 2015, to Rule 26, Federal Rules of Civil Procedure. Previously, various factors bearing on proportionality were part of Rule 26(b)(2)(B), which allows the court to limit discovery. The amendment moves those factors, slightly rearranges and modifies them, and adds two factors. They are now identical to those in Rule 26, Federal Rules of Civil Procedure, and the Committee expects that caselaw interpreting those factors in the federal rule will be helpful in construing our rule.

Moving the factors relating to proportionality should highlight the need to size discovery to the needs of a particular case. All parties should share the responsibility to honor these limits on the scope of discovery. Notably, the change does not place on the party seeking discovery the burden of addressing all proportionality considerations. This is left to the discretion of the trial court. The change is not intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that the discovery sought is not proportional to the needs of the case. The parties have a collective responsibility to provide the court with all appropriate information regarding proportionality, and the court must determine whether the discovery sought is proportional to the needs of the case.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding to particular discovery requests. A party claiming undue burden or expense ordinarily has far better information -- perhaps the only information -- with respect to that determination. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the information sought bears on the issues as that party understands them. The

court's responsibility, using all the information provided by the parties, is to consider these and all the other proportionality factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to Rule 26, providing increased focus on considerations previously implicit in former Rule 26(b)(2)(B)(iii). Some cases involve what often is called "information asymmetry." One party -- often an individual plaintiff -- may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Likewise, the directive to consider "the importance of the discovery in resolving the issues" is new in the text but was previously implicit in the language in former Rule 26(b)(2)(B)(iii) regarding "the needs of the case."

The Committee believes that discovery will normally be effectively managed by the parties and that they will be able to resolve proportionality issues with little dispute in the vast number of actions. However, the proportionality factors added to Rule 26(b)(1) are particularly important for those actions that involve more complexity, including, without limitation, actions involving commercial disputes, class actions, multiparty actions, product-liability actions, and actions involving electronic discovery. In such actions, greater judicial involvement in the discovery process may be necessary and discovery may not operate on a self-regulating basis. The information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. The amendments reflect the need for continuing and close judicial involvement in cases that do not yield readily to the ideal of effective party management and provides the parties and the court with a standard to use.

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue

to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as more reliable means of searching electronically stored information become available.

Furthermore, Rule 26(b)(1) has been amended to delete the following language regarding the scope of discovery: "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." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the text of Rule 26(b)(1) with those examples. The discovery identified in those examples should still be permitted under the amended rule when relevant and proportional to the needs of the case.

Although Rule 26(b)(1) has been amended to reflect the transfer of the considerations that bear on proportionality from Rule 26(b)(2), other portions of Rule 26(b)(2) entitled "Limitations" remain in place regarding electronically stored information (subsection (A)) and the frequency and extent of the use of the various discovery methods (subsection (B)). Among the retained limitations is the admonition that a party's discovery may be limited if the party seeking discovery "has had ample opportunity by discovery in the action to obtain the information sought." This limitation is primarily intended to apply to situations in which the costs or burdens of discovery could have been reduced if the discovery had been sought earlier in the litigation (for instance, seeking to depose the same (or a similar) witness to ask new questions absent good cause or seeking to use additional search terms for electronically stored information that has already been searched, or to identify additional custodians of electronically stored information that has already been searched, absent good cause).

APPENDIX D

Rule 26(c), Alabama Rules of Civil Procedure

(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 or the allocation of expenses 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.

APPENDIX E

Committee Comments to Amendment to Rule 26(c)
Effective December 21, 2018

Consistent with the changes to the Federal Rules of Civil Procedure in 2015, which included the simultaneous changes in federal Rule 26(b)(l), the federal corollary to Rule 26(b)(1) and (2), Alabama Rules of Civil Procedure, and federal Rule 26(c), Rule 26(b)(1) and (2) and Rule 26(c), Alabama Rules of Civil Procedure, have been amended. Rule 26(c) specifically is amended to expressly authorize the trial court to allocate the expenses of discovery, including the expense of restoring or replacing lost information under Rule 37(g), Alabama Rules of Civil Procedure. See also Committee Comments to Amendment to Rule 37(g), Alabama Rules of Civil Procedure, Effective December 21, 2018.

APPENDIX F

Rule 37(g), Alabama Rules of Civil Procedure

(g) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and if it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of use of the information in the litigation, may:

(A) presume that the lost information was unfavorable to the party responsible for its loss;

(B) instruct the jury that it may or must presume the information was unfavorable to the party responsible for its loss; or

(C) dismiss the action or enter a default judgment.

APPENDIX G

Committee Comments to Amendment to Rule 37(g)
Effective December 21, 2018

A. Introduction

See section 1 of the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, and the Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010, for general information concerning the changes to Rules 26 and 37 governing discovery of electronically stored information.

Rule 37(g), as adopted in 2010 to be consistent with the 2006 changes to the Federal Rules of Civil Procedure related to discovery of electronically stored information, provided: "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." Since the adoption of Rule 37(g), there has been a large increase in the volume of electronically stored information, and discovery related to electronically stored information has likewise increased. Certainly, discovery should not prevent continued routine operation of computer systems necessary for business or other endeavors in this world increasingly connected by computer systems. But it is important for a party aware of the existence of relevant electronically stored information to take reasonable steps to preserve such information. Uncertainties under former Rule 37(g) concerning discovery of electronically stored information and sanctions for failure to preserve electronically stored information had the potential to result in litigants expending significant time and money on preservation efforts in order to avoid the risk of sanctions if a court were to find they did not do enough to preserve electronically stored information.

B. Section (g)

Rule 37(g), as amended, focuses upon the reasonableness of the steps taken to preserve electronically stored information, as well as whether the information can be replaced or restored. Under former Rule 37(g), sanctions could not be imposed if the information was lost as a result of the "routine, good-faith operation" of a party's computer

system and "exceptional circumstances" were not presented. Moreover, the rule did not speak to the curative measures a court could employ when punitive sanctions were to be imposed. Rule 37(g), as amended, specifies measures a court may employ if information that should have been preserved is lost and specifies the findings necessary to justify those measures. It therefore forecloses reliance on the inherent authority of the court to determine when certain measures should be used.

Although former Rule 37(g) indicated that spoliation of electronically stored information should be reviewed using a standard that turns on "good faith," Rule 37(g), as amended, focuses more upon the reasonableness of the steps taken to preserve the information. Too, Rule 37(g), as amended, addresses more specifically the sanctions that may be imposed and recognizes the difference between sanctions intended to cure prejudice to a party, including the assessment of the cost of replacing or restoring the lost information, and punitive sanctions when there has been a deliberate manipulation of computer systems to prevent discovery of relevant and important information.

Under Rule 37(g), as amended, before the court considers measures necessary to cure prejudice to a party, it must find not only that reasonable steps were not taken to preserve relevant information, but also that the information cannot be restored or replaced. To this end the court may, for example, order additional discovery from sources that were previously designated as not reasonably accessible because of burden or cost under Rule 26(b)(2)(A). Further, pursuant to a simultaneous change to Rule 26(c), express authorization is provided to the court to assess the associated costs, including the cost of replacing or restoring the information and attorney fees, to the party who lost the information.

However, it should be remembered that efforts to restore or replace lost information should be proportional to the importance of the lost information.

C. Subsection (g)(1)

The rule does not specify which party bears the burden of proving prejudice once it has been determined that electronically stored information has been lost because of a failure to take reasonable steps to preserve the information. This is left to the discretion of the trial court. As the

Advisory Committee's Notes on the 2015 Amendment to Rule 37, Federal Rules of Civil Procedure, state:

> "Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases."

If the trial court finds that electronically stored information should have been preserved, has been lost because a party failed to take reasonable steps to preserve it, and cannot be replaced or restored and that another party has been prejudiced, it may order appropriate measures to cure the prejudice, but nothing more. Such measures, as noted in the Federal Advisory Committee's Notes, may include prohibiting the party that lost the information from putting in certain evidence. For example, the court may "exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence." Advisory Committee's Notes to the 2015 Amendment of Rule 37, Federal Rules of Civil Procedure. However, the objective must be only to cure the prejudice, and, as the Federal Advisory Committee notes: "Care must be taken ... to ensure that curative measures under subdivision (e)(1)[Rule 37(g)(1), Ala. R. Civ. P., as amended,] do not have the effect of measures that are permitted under subdivision (e)(2) [Rule 37(g)(2), Ala. R. Civ. P., as amended,] only on a finding of intent to deprive another party of the lost information's use in the litigation."

The amendment to our Rule 37(g) requires that the court, not the jury, determine not only whether the lost information should have been preserved, whether the loss resulted from a failure to take reasonable steps to preserve it, and whether it can be replaced or restored, but also whether another party has been prejudiced by the loss and what measures should be taken to cure that prejudice, being mindful that the rule

calls for measures no greater than necessary to cure the prejudice. It was the opinion of the Committee recommending this amendment that the court was in a much better position to make such determinations and that to allow the parties to put in evidence of the loss and to allow the jury to determine the appropriate cure had too much potential to distract the jury. It should be noted that this may be a departure from the Federal Rules of Civil Procedure. Although the corresponding federal rule is not clear as to whether the court or the jury should make such determinations, the Advisory Committee's Notes to the federal rule appear to indicate that the federal rule allows the court to permit the parties to put in evidence of the loss and allow the jury to determine the appropriate cure.

D. Subsection (g)(2)

Rule 37(g)(2), as amended, applies to those rare cases when a party deliberately fails to preserve electronically stored information with intent to prevent another party's use of that information. In other words, the intent required to invoke subsection (g)(2) is the specific intent to deprive another party of electronically stored information and anything short of such specific intent would not involve this subsection. It is noted that the corresponding federal rule addresses the negligent and the intentional loss of electronically stored information, but nothing is directly said in the Advisory Committee's Notes to the federal rule about wanton conduct, although the Federal Advisory Committee's Notes do make clear that "grossly negligent" conduct is to be treated in the same manner as a negligent loss of information. Moreover, if the trial judge believes the loss of information was occasioned by conduct that is more egregious than negligence, but is not intentional, under the Alabama rule the judge is provided discretion under subsection (g)(1) to take appropriate measures to cure the prejudice. This approach also simplifies matters for the trial court, which will have to fit the facts into only one of two, not three, categories (i.e., intentional conduct and nonintentional conduct).

Subsection (g)(2)(A) authorizes the court to presume that the lost information was unfavorable to the party responsible for its loss. This could have application when the court is presiding at a bench trial or ruling on a pretrial motion.

Subsection (g)(2)(B) has application in a jury trial and provides that the court may instruct the jury that it may or must presume the information lost was unfavorable to the party that lost it. The Alabama rule requires that the court make the finding whether the relevant information was lost intentionally (that is, with the intent to deprive another party of the use of the information in the litigation) and, if so, the sanction to impose, which may include an adverse-inference charge. If the court determines that such loss was intentional, it may give the "must presume" adverse-inference charge as the sanction. The court having found that the party intentionally lost the information, it may be inferred that the information lost was both unfavorable to the party that lost it and favorable to the opposing party's case.

Here again, the Alabama Rules of Civil Procedure deviate from the Federal Rules of Civil Procedure, which allow the court to permit the jury to determine the issue of intent and, if the jury finds intent, gives the jury the option of presuming that the information was unfavorable to the party that lost it. This, of course, would require that the parties put in evidence of the loss. Although this is not entirely clear from the federal rule itself, it is clearly expressed in the Advisory Committee's Notes to the federal rule.

This amendment to Rule 37(g) does not change existing Alabama substantive law regarding spoliation of evidence or when a duty to preserve evidence arises. Further, this amendment addresses only electronically stored information and leaves unchanged Alabama law as to sanctions for the failure to preserve other types of evidence or information.