IN THE SUPREME COURT OF ALABAMA
November 4, 2009

ORDER

IT IS ORDERED that Rule 16, Rule 26, Rule 33(c), Rule 34, Rule 45, and Form 51A, Alabama Rules of Civil Procedure, be amended to read in accordance with Appendices A, C, E, G, I, and K, respectively, and that Rule 37(g), Alabama Rules of Civil Procedure, be adopted to read in accordance with Appendix L;

IT IS FURTHER ORDERED that 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, and the Committee Comments to Amendment to Rule 45 Effective February 1, 2010, be adopted to read in accordance with Appendices B, D, F, H, and J, respectively, and that the Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010, be adopted to read in accordance with Appendix M;

IT IS FURTHER ORDERED that the amendment of Rule 16, Rule 26, Rule 33(c), Rule 34, Rule 45, and Form 51A, the adoption of Rule 37(g), and the adoption of the comments are effective February 1, 2010;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 16, Rule 26, Rule 33, Rule 34, Rule 37, Rule 45, and Form 51A:

> "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."

Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, Parker, Murdock, and Shaw, JJ., concur.

APPENDIX A

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT.

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion at any time direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating the settlement of the case.

When the court has not ordered a conference, any party may require the scheduling of such conference on written notice served at such time in advance of trial so as to permit the conference to take place at least twenty-one (21) days before the case is set for trial.

(b) Scheduling and Planning. The court may enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial;

(5) provisions for discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or asserting that certain material is protected as trial-preparation material after the material has been produced; and

(7) any other matters appropriate in the circumstances of the case.

Any scheduling order shall be issued as soon as practicable. Once a scheduling order is issued, the schedule set thereby shall not be modified except by leave of court upon a showing of good cause.

(c) Subjects to Be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the voluntary use by all parties of extrajudicial procedures to resolve the dispute, including mediation conducted pursuant to the Alabama Civil Court Mediation Rules;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or a party's attorney is substantially unprepared to participate in the conference, or if a party or a party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and, among others, any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred

because of any noncompliance with this rule, including attorney fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

(dc) District Court Rules. Pretrial procedure in the district court shall be as follows:

Immediately preceding the trial on the merits, or prior thereto, if justice requires, the court may direct and require the attorneys for the parties to appear before it for a conference to consider and determine:

(1) the simplification of the issues;

(2) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof;

(3) such other matters as may aid in the disposition of the action.

APPENDIX B

Committee Comments to Amendment to
Rule 16 Effective February 1, 2010

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37 and 45, which govern discovery of electronically stored information ("ESI"). The amendment to Rule 16 adds new paragraphs (b)(5) and (6) and renumbers former paragraph (b)(5) to (b)(7).

If discovery of ESI is anticipated by the parties, the issues unique to such discovery should be addressed early, hence the new provision in subdivision (b)(5) inviting the court to address any such issues in its scheduling order. However, many cases will not involve discovery of ESI, because the parties may be satisfied that traditional discovery -- i.e., providing hard copies of materials -- will be sufficient. Such may be the case when the parties do not possess a significant volume of ESI and production of hard copies is more efficient and will provide the needed information. In such cases, the court need not and should not compel the parties to address ESI discovery issues in a scheduling order, at a discovery conference, or otherwise.

Recognizing that the volume of ESI produced may be exponentially larger than prior "paper discovery" and that the parties may wish to expedite the production of ESI, subdivision (b)(6) allows the parties to agree (and the court to adopt their agreement as its order) concerning nonwaiver of any claim of privilege or work-product protection in the event such materials are inadvertently produced. For example, the parties may agree that the producing party will initially produce responsive material without conducting a review for documents protected by the attorney-client privilege or materials protected as work product, with such a review to follow the receiving party’s review of the materials and its designation of which materials it desires. If privileged or protected materials are designated by the receiving party, the producing party may then assert the privilege or protection without having waived the privilege or protection by earlier producing such material.

Alternatively, to expedite production and to accommodate a fast-paced review of whether a claim of privilege or protection applies before production, the parties may agree that the claim of privilege or protection is not waived by virtue of the inadvertent production of such materials. Under such an agreement, if protected materials are inadvertently produced, the producing party may assert the privilege or protection postproduction and obtain return of the materials, with the receiving party's retaining its right to argue that the material in question is not privileged or protected in the first instance.

A corresponding change has been made in Rule 26(b)(6)(B), which addresses the procedure to be followed in the event of inadvertent production, regardless of whether the parties have entered into any agreement. Of course, Rules 16 and 26 are procedural in nature and do not address substantive waiver law, and, in the absence of an agreement, the question whether a producing party has waived a claimed privilege or protection will be decided under substantive waiver law. Although the court may not enter an order contrary to substantive waiver law in the absence of the consent of all parties, it may enter such an order with consent and enforce the terms thereof.

APPENDIX C

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.

APPENDIX D

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.
>
> "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.

"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.

APPENDIX E

RULE 33. INTERROGATORIES TO PARTIES.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

APPENDIX F

Committee Comments to Amendment to
Rule 33(c) Effective February 1, 2010

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37, and 45, which govern discovery of electronically stored information ("ESI").

The addition of the language "including electronically stored information" to subdivision (c) is intended to accommodate the use of ESI, as well as hard copies of business records, in responding to an interrogatory. However, the use of ESI, like the use of hard copies of documents, is qualified: The burden on the interrogating party to obtain the answers to the questions must not be substantially greater than the burden would be on the responding party.

The Federal Rules of Civil Procedure Advisory Committee Notes to Rule 33 are instructive and provide practical guidance:

> "Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) [Ala. R. Civ. P. 33(c)] allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) [Ala. R. Civ. P. 33(c)] states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it 'as readily as can the party served,' and that the responding party must give the interrogating party a 'reasonable opportunity to examine, audit, or inspect' the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support,

information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) [Ala. R. Civ. P. 33(c)] by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d) [Ala. R. Civ. P. 33(c)]."

APPENDIX G

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES.

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect, copy, test, or sample any designated tangible things that constitute or contain matters within the scope of Rule 26(b) and that are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and shall describe each item and category with reasonable particularity. The request may specify the form or forms in which electronically stored information is to be produced. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will

be permitted as requested unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information -- or if no form was specified in the request -- the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces hard copies of documents for inspection that are not electronically stored shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

Regarding the discovery of electronically stored information:

(i) a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

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

(c) Persons Not Parties. A person not a party to the action may be compelled to produce documents, electronically stored information, and things or to submit to an inspection as provided in Rule 45.

(dc) District Court Rule. Rule 34 applies in the district courts in those instances where production and inspections are permitted by Rule 26(dc).

APPENDIX H

Committee Comments to Amendment to
Rule 34 Effective February 1, 2010

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37, and 45, which govern discovery of electronically stored information ("ESI").

The amendment to subdivision (a) of Rule 34 places ESI on an equal footing with hard copies of documents and recognizes that the producing party may, under certain circumstances, be required to translate ESI into a reasonably usable form, as is further addressed in subdivision (b).

The amendment also recognizes that the requesting party may, under appropriate circumstances, be allowed to test or sample the material sought. However, the court should address confidentiality and privacy issues in determining whether to allow such testing or sampling and the conditions or restrictions under which such testing or sampling is to proceed if allowed.

The amendment to subdivision (b) allows, but does not require, the requesting party to designate the form in which ESI should be provided. If the responding party objects to producing ESI in the form requested (or if the requesting party does not specify a form), the responding party must identify the form in which it intends to produce ESI. Moreover, if the requesting party does not specify a form, the responding party must produce ESI in the form in which it is ordinarily maintained or in a form that is reasonably usable.

The responding party's designation of form in which it will produce ESI should precede the production of ESI. Otherwise, the responding party runs the risk it may later be required to produce ESI in a proper form. Of course, if the parties are unable to agree to the form of production, motion practice is available to resolve the issue.

As with the other ESI amendments to these Rules, the Federal Rules of Civil Procedure Advisory Committee Notes to

Rule 34 are helpful in understanding the need for and interpretation of the changes to Ala. R. Civ. P. 34(b):

> "The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.
>
> "The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) [Ala. R. Civ. P. 26(f)] is amended to call for discussion of the form of production in the parties' prediscovery conference.
>
> "The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically

stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

"If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) [Ala. R. Civ. P. 37(a)(2)] in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

"If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party 'translate' information it produces into a 'reasonably usable' form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party

to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

"Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is 'legacy' data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B) [Ala. R. Civ. P. 26(b)(2)(A)].

"Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form."

APPENDIX I

RULE 45. SUBPOENA.

(a) Form; issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2) A subpoena commanding attendance at a trial or hearing and a subpoena commanding attendance at a deposition shall issue from the court in which the action is pending.

(3) The clerk shall issue a subpoena to a party requesting it, except that a subpoena for production, inspection, copying, testing, or sampling separate from a subpoena commanding the attendance of a person shall issue from the court in which the action is pending pursuant to the additional requirements set forth below:

(A) Notice of Intent to Serve Subpoena for Production or Inspection. The party seeking issuance of a subpoena for production, inspection, copying, testing, or sampling shall serve a notice to every other party of the intent to serve such subpoena upon the expiration of fifteen (15) days from the service of the notice, and the proposed subpoena shall be attached to the notice. The court may allow a shorter or longer time. Such notice may be served without leave of court upon the expiration of forty-five (45) days after service of the summons and complaint or other mode of service under Rule 4-Rule 4.4 upon any defendant, except that leave is not required within the forty-five- (45-) day period if a defendant has previously sought discovery.

(B) Objection to Issuance of Subpoena for Production or Inspection. Any person or party may serve an objection to the issuance of a subpoena for production, inspection, copying, testing, or sampling within ten (10) days of the service of said notice and in such event the subpoena shall not issue. The party serving the notice may move for an order under Rule 37(a) with respect to such objection. If no objection is timely served, the clerk shall cause the subpoena to be issued upon the expiration of fifteen (15) days from the service of the notice or upon the expiration of such other time as may have been allowed by the court.

(C) Content of Subpoena for Production or Inspection. The subpoena shall be directed to a person at a stated address, and, if the name of the person is not known, the subpoena shall give a general description sufficient to identify the person or the particular class or group to which the person belongs. The subpoena shall set forth the items to be produced, inspected, copied, tested, or sampled, either by individual item or by category, and describe each item and category with reasonable particularity. The subpoena shall specify a reasonable time to comply of no less than fifteen (15) days after service unless the court orders otherwise and the manner of making the inspection, production, copying, testing, sampling, and performing the related acts. Such activities with reference to documents, including electronically stored information, or tangible things

shall take place where the documents or tangible things are regularly kept or at some other reasonable place designated by the recipient. The subpoena may give the recipient an option to deliver or mail legible copies of documents or things to the party serving the subpoena, but the recipient may condition the preparation of copies on the payment in advance of the reasonable cost of making such copies. Any other party shall have the right to be present at the time of compliance with the subpoena. The subpoena shall advise the recipient of the right to object at any time prior to the date set forth in the subpoena for compliance therewith.

(D) Availability of Copies of Documents. If the party serving the subpoena obtains copies of documents, including electronically stored information, or things, that party shall make available a duplicate of such copies at the request of any other party upon the payment of the reasonable cost of making such copies.

(b) Service.

(1) A subpoena may be served by the sheriff, a deputy sheriff, or by any other person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein and, if the person's attendance at a place more than 100 miles from the person's residence is commanded, by tendering to that person the fees for one day's attendance and an amount to reimburse the mileage allowed by law. Prior notice of intent to secure the issuance of a subpoena to command production of documents and things or inspection of premises before trial under the procedure set forth in subparagraph (a)(3) of this rule shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the state.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is

issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court from which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(2)(A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents, or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(B) Subject to subdivision (d)(2) of this rule, a person commanded to produce and permit inspection, copying, testing, or sampling at any time before the time specified for compliance may serve upon the party or attorney designated in the subpoena written objection to producing any of or all the designated materials or to inspection of the premises or to producing electronically stored information in the form or forms requested. "Serve" as used herein means mailing to the party or attorney. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a resident of this state who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed, or regularly transacts business in person, or requires a nonresident of this state who is not a party or an officer of a party to travel to a place within this state more than one hundred (100) miles from the place of service or, where separate from the place of service, more than one hundred (100) miles from the place where that person is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the

court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(3) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena 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.

(4) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(5) A person responding to a subpoena need not provide discovery of electronically stored information from sources the person identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person 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, considering the limitations of Rule 26(b)(2)(B). The court may specify conditions regarding the production of the discovery.

(6) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the person or 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. Any party or the producing person 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 person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

(dc) District Court Rule. Rule 45 applies in the district courts.

APPENDIX J

Committee Comments to Amendment to Rule 45 Effective February 1, 2010

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37, and 45, which govern discovery of electronically stored information ("ESI").

The changes to Rule 45 are intended to accommodate the discovery of ESI from persons who are not parties on the same terms and conditions as discovery of ESI from persons who are parties. However, there is substantial difference between a party and an unrepresented person. The latter is likely unaware of his or her rights, such as the right to object to producing ESI in the form specified in the subpoena, his or her obligations to produce in the form in which it is ordinarily maintained or a form that is reasonably usable, his or her right to identify sources of ESI that are not reasonably accessible in lieu of producing the material, and the procedures to be followed if privileged or protected information is inadvertently produced.

Accordingly, the parties are reminded of their responsibility under subdivision (c) of Rule 34 to avoid imposing undue burden or expense on persons who are not parties, and the court is encouraged to enforce this obligation. Moreover, Form 51A has been revised to help ensure that persons who are not parties are not put to undue burden or expense.

APPENDIX K

Form 51A. Civil Subpoena for Production of Documents, Etc., under Rule 45.

To _____

You are hereby commanded to do each of the following acts at the instance of the (*Plaintiff, Defendant, etc.*) within _____ days (no sooner than fifteen (15) unless the court orders otherwise) after service of this subpoena.

(1) That _____ produce and permit (*Plaintiff, Defendant, etc.*) to inspect and to copy each of the following documents:

[Here list the documents either individually or by category and describe each of them.]

Such production and inspection is to take place at the place where the documents or things are regularly kept or at some other reasonable place designated by you.

You are further advised that other parties to the action in which this subpoena has been issued have the right to be present at the time of such production or inspection.

You have the option to deliver or mail legible copies of documents or things to the party causing the issuance of this subpoena but you may condition such activity on your part upon the payment in advance by the party causing the issuance of the subpoena of the reasonable costs of the making of such copies.

(2) That _____ produce and permit (*Plaintiff, Defendant, etc.*) to inspect, copy, test, or sample each of the following objects:

[Here list the objects either individually or by category and describe each of them.]

Such production and inspection is to take place at the place where the documents or things are regularly kept.

You are further advised that other parties to the action in which this subpoena has been issued have the right to be present at the time of such production or inspection.

(3) That _____ permit (*Plaintiff, Defendant, etc.*) to enter *[here describe the property to be entered]* and to inspect, photograph, test, and sample *[here describe the portion of the property and the objects to be inspected]*.

[Here state the time and manner of making the inspection and performance of any related acts.]

The (*Plaintiff, Defendant, etc.*) agrees to pay all reasonable expenses incurred by _____ at the aforementioned time and place.

You have the right to object at any time prior to the date set forth in this subpoena for compliance. Should you choose to object, you should communicate such objection in writing to the party causing the issuance of this subpoena and state, with respect to any item or category to which objection is made, your reasons for such objection.

If the materials subpoenaed are stored electronically by you (whether or not they may also be available in paper copy), and if you prefer to produce them in electronic format or in hard-copy format, you should make known your preference to counsel for the party who issued the subpoena and discuss the production with counsel.

If you are producing electronically stored information ("ESI"), you have certain rights as well as obligations.

- You may object to providing the ESI in the form specified by the requesting party. If you object, you should specify the form in which you wish to provide the ESI.
- If the requesting party did not specify the form in which the ESI is to be produced, you may produce the information in the form in which you ordinarily maintain it or a form that is reasonably usable. You should advise the requesting party of your intent before you produce the information.

- If the source of the ESI subpoenaed is not reasonably accessible, you should identify the source to the requesting party, and you need not then produce the information unless the court so orders.

- If in producing ESI you inadvertently produce privileged or protected information, you may notify the requesting party of that fact, and the information will be returned, sequestered, or destroyed by the requesting party, pending a ruling on your assertion of privilege if a ruling is requested.

If you and counsel for the requesting party cannot agree regarding the above matters or any other matter concerning your compliance with the subpoena, you should object, as mentioned above.

Dated_____, 20___.

_____
Attorney for

_____ _____
CLERK

_____ By:_____
Address Deputy Clerk

APPENDIX L

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS.

(g) Electronically stored information. 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.

APPENDIX M

Committee Comments to Adoption of Rule 37(g) Effective February 1, 2010

See the Committee Comments to Amendment to Rule 26 Effective February 1, 2010, for general information concerning the comprehensive changes to Rules 16, 26, 33(c), 34, 37, and 45, which govern discovery of electronically stored information ("ESI").

The change to Rule 37 recognizes that ESI is routinely and automatically altered and deleted in the normal course of business for reasons entirely unrelated to litigation. Accordingly, ESI may be lost or destroyed without culpability, fault, or ill motive. The addition of subdivision (g) to Rule 37 recognizes this and provides that, absent exceptional circumstances, sanctions are inappropriate if ESI is lost as a result of the routine operation of a computer system, provided that the party responsible for the lost ESI was acting (or failed to act) in good faith.

Good faith may require a party to take steps to alter the routine operation of the computer system or otherwise preserve appropriate ESI if a duty to preserve exists. This rule is procedural and does not address the issue whether and when such a duty exists. However, when it does exist, the party must act appropriately, which may include issuing a "litigation hold."

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.

A decision whether a party has acted in good faith regarding ESI that is within sources that are not reasonably accessible should be made on a case-by-case basis. As the Federal Rules of Civil Procedure Advisory Committee Notes to Fed. R. Civ. P. 37 provide: "One factor [to be considered] is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources."