New Federal Procedural Rules Concerning Electronically Stored Information

I. Introduction.

The pre-trial discovery process provides the parties to a lawsuit with the opportunity to gain access to most relevant information in the possession of the other party. A large percentage of lawsuits are settled or dismissed before trial, most often based upon information revealed during discovery (when depositions are taken, documents are provided by one party to the other, etc.) As a consequence, the discovery phase of a trial is typically crucial in terms of outcome.

In federal cases, discovery obligations begin even before a suit has been filed or a demand letter has been received from a plaintiff's attorney. A party who reasonably anticipates litigation is obligated to preserve information relevant to the litigation that may ultimately be subject to discovery. Once a suit has been filed, each party is required to make initial disclosures to the other of the names of witnesses to be called to testify and a list of documents to be offered into evidence. Additionally, each party must respond appropriately to subpoenas, interrogatories, depositions, requests for admissions, etc., filed by the other party.

In recognition of the critical importance of the discovery process, trial judges have broad discretion to impose sanctions and remedies to deal with unfair prejudice resulting from instances where a party negligently or intentionally loses or destroys relevant evidence. This discretion rests on the doctrine of "spoliation" (literally, to "injure" or "plunder"). Sanctions for spoliation can be devastating. They include exclusion of testimony by witnesses guilty of spoliation, "negative inference" jury instructions indicating that the jury may assume the lost evidence would have been harmful to the spoliator's case, limitations on the use of witnesses involved in spoliation, dismissal of the spoliator's claim, requiring the spoliator to pay the costs of the motion for sanctions, imposition of fines, reversal of the burden of proof in the case, and entry of a default judgment against the spoliator.

The case of *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005) illustrates the potential severity of sanctions for spoliation. In this case, Phillip Morris failed to follow the court's order to preserve e-mail. Instead, eleven of the company's high ranking officers and supervisors who were to be called as witnesses by the company destroyed their e-mail for a period of over two years, despite the court's order and the company's own "print and retain" policy. As sanctions, the court barred Phillip Morris from calling any of the eleven as witnesses and imposed $2.75 million in fines on the company for its spoliation of e-mail.

In order to manage the discovery process and other matters affecting the progress of a civil trial, the Federal Rules of Civil Procedure (FRCP) provide for a Discovery Planning Conference (**FRCP 26(f)**) and a Scheduling Conference (**FRCP 16(b)**). The Discovery Planning Conference is to be held as soon as practicable and, in any event, at least 21 days before the Scheduling Conference is held. This Discovery Planning Conference results in a Discovery Plan being proposed by the parties for consideration by the judge. The Scheduling Conference results in a Scheduling Order issued by the court that must be entered within 90 days of the date of the first appearance of a defendant. As a result, issues relating to discovery must be dealt with very early in the progress of the case.

In the absence of specific provisions in the FRCP dealing with discovery of electronically stored information (ESI), the federal courts have relied on existing FRCP provisions, which were written with a focus on concerns attendant to production of information stored in paper documents. This has resulted in decisions regarding discovery of ESI being made on an *ad hoc* basis with varying results in different jurisdictions.

Only recently have proposed changes to the FRCP been drafted to deal specifically with the problems associated with ESI discovery. Following five years of study, coupled with public hearings and receipt of public comment, the Advisory Committee on Civil Rules drafted proposed amendments to deal specifically with ESI and submitted them to the U.S. Supreme Court for its consideration. Having been accepted without comment by the Court on April 12, 2006, the proposed amendments became effective on December 1, 2006, upon Congress's failing to enact legislation to reject, modify, or defer them.

II. Pre-Filing Implications.

The only amendment which is totally new is the addition of **Rule 37(f)** regarding sanctions for loss of ESI. Losses of ESI may occur at the "pre-filing stage" (which relates to the time before a lawsuit is actually filed) if a party should reasonably anticipate litigation and may also occur during later stages in the progress of the case. The new provision states as follows: "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." The Advisory Committee's note explains that "routine operation" refers to the ways in which electronic information systems are generally designed, programmed, and implemented to meet the party's technical and business needs. It includes alteration and overwriting of information, often without the operator's specific direction or awareness.

However, there is no mention as to whether the common practice of over-writing of back-up tapes at regular intervals would constitute a "routine operation." Most importantly, the good faith requirement precludes a party from exploiting routine operations to thwart discovery obligations by allowing such operations to continue in order to destroy information that the party is required to preserve. As a result, it will be necessary to develop procedures to implement an immediate and comprehensive "litigation hold" to insure that all relevant ESI will be protected from destruction through routine operations of electronic information systems or otherwise. The Advisory Committee's note also points out that good faith may require a party to prevent the loss of information on storage sources that the party believes are not reasonably accessible under **Rule 26(b)(2)**. Finally, the note stresses that this new provision only applies to sanctions "under these rules" and does not affect other sources of authority to impose sanctions or the rules of professional responsibility.

III. Initial Disclosure, Discovery Conference and Scheduling Conference Implications.

One of the major premises of the amendments is the importance of having the parties to litigation address the issue of ESI discovery early in the case. In this regard, **Rule 16(b)** is amended to provide for the inclusion of provisions for disclosure or discovery of ESI in the

Scheduling Order issued by the judge or magistrate in most cases. Additionally, **Rule 26(a**) is amended to the effect that ESI that a party may use to support its claims or defenses is to be included among the information a party must, without awaiting a discovery request, provide to other parties. Finally, **Rule 26(f)** is amended to require pretrial conferences to plan for discovery and to address the preservation of discoverable information and other ESI disclosure/discovery issues, including the form or forms in which it should be produced. As a matter of administrative consistency, Form 35, Report of Parties' Planning Meeting, is amended to provide that the parties' proposals for ESI disclosure/discovery are to be included in the report following the **Rule 26(f)** Discovery Planning Conference.

IV. Responsive Discovery Implications.

Amendments to **Rules 33** and **34** specifically recognize ESI as a category of information serving as a basis for responses to interrogatories and production requests. This is done in succinct fashion by stating, in amended **Rule 33(d)**, that ESI is within the meaning of "business records" where that Rule gives the responding party the option of providing access to business records instead of providing a direct answer to interrogatories, as long as the burden of deriving the answer will be substantially the same for either party. The Advisory Committee's note states that in some cases the responding party may be required to provide technical support, information on application software, or other assistance in order to meet the requirement that the interrogating party be able to derive or ascertain the answer from ESI as readily as the responding party.

In the case of **Rule 34**, the amendments are more expansive and include adding ESI to the title of the Rule. **Rule 34(a)**, which deals with the scope of the Rule, is amended to specifically include ESI among those items that are subject to production. This section is also amended to provide for testing or sampling of ESI or documents to determine their content and possible relevance. According to the Advisory Committee's note, access for such purposes is to be determined by consideration of the burdens and intrusiveness of the testing or sampling and may in some cases raise issues of confidentiality or privacy. The test and sampling provisions are not meant to create a routine right of direct access to a party's electronic information system.

Rule 34(b), which deals with procedure, is amended to permit, though not require, the requesting party to specify the form or forms in which ESI is to be produced. Correspondingly, the responding party is given the right to object, not only to the request in general, but also the requested form. The reasons for such objections must be stated and the responder must specify the form it intends to use. Additionally, when producing ESI where no form was specified in the request, the responding party must state the form it intends to use. If a request for ESI does not specify the form for production, the responding party must produce the information in a form in which it is ordinarily maintained or in a reasonably usable form. Finally, a party need not produce the same ESI in more than one form.

While ESI is in many instances more readily searchable than paper documents, which facilitates the discovery process, this is by no means always the case. ESI is frequently stored in various formats making it difficult and very expensive even to determine if relevant information is present. For example, some ESI is contained in back-up tapes that are intended for disaster

recovery purposes and are not indexed, organized, or susceptible to electronic searching. Other ESI is stored in "legacy" formats that are not compatible with successor computer systems. Even "deleted" data can be restored and retrieved with the aid of forensic computer technologies.

The amendments to **Rule 26(b)(2)** pertaining to discovery scope and limits attempt to accommodate the difficulty and expense of searching certain types of ESI by providing for a two-tier procedure. Under this procedure, a party need not provide discovery of ESI from sources that the party identifies as being not reasonably accessible because of undue burden or cost. On the requesting party's motion to compel or for a protective order, the party from whom discovery is sought must support such a claim. Even then, the court may, upon a showing of good cause by the requesting party, order discovery from such sources. In such a case, the court may also specify conditions for the discovery. The Advisory Committee's note points out that identification of ESI as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence.

The review of potentially discoverable materials for the presence of attorney-client privileged or attorney work-product material has always been a complicated factor generating cost and delay. The potentially huge volume of information contained in ESI as well as the varied ways in which information is stored and displayed make this problem more severe than in the case of paper documents. The risk of waiver attendant to turning over privileged or work-product material during discovery is said to have resulted in one prominent New York City law firm devoting three floors in its basement to cubicles housing contract attorneys who work full-time on privilege review. Law firms specializing in such review have been formed as well.

The Advisory Committee has made no attempt to address substantive questions such as whether privilege or work product protection has been waived or forfeited. Instead, it has chosen to recognize the increased likelihood of inadvertent disclosure of materials subject to claims of privilege or work-product protection and, perhaps, to encourage somewhat less deliberate review prior to information being turned over pursuant to discovery. This has been done by amending **Rule 26(b)(5)**, without specific reference to ESI, to allow a party to assert a claim of privilege or work-product protection regarding material that has already been produced incident to discovery. In order to assert such a claim, the party must notify the receiving party of the claim and its basis. After receiving such notice, the receiving party must promptly return, sequester, or destroy the specified information and any copies it has, and it may not use or disclose the information until the claim is resolved. A receiving party has the option to promptly present the information to the court under seal for determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve the information. The producing party must preserve the information pending resolution of the claim.

V. Third Party Discovery Implications.

It is not unusual for parties to a lawsuit to seek discovery of information in the possession of individuals or entities who are not parties to the litigation. Since such information may contain ESI, the Advisory Committee has amended **Rule 45** regarding subpoenas issued to non-parties. These amendments essentially track the changes earlier discussed pertaining to **Rules 26**

and **34. Rule 45(a)** is expanded to permit the subpoena to specify the form in which ESI is to be produced. **Rule 45(c)(2)(B)** is correspondingly amended to permit objections to providing ESI in the form specified in the subpoena. If the subpoena does not specify the form for producing ESI, **Rule 45(d)(1)(B)** calls for it to be produced in a form "reasonably usable." Under **Rule 45(d)(1)(C)**, the same information stored as ESI need only be produced in one form.

Rule 45(d)(1)(D) is amended to permit a non-party to assert that discovery of ESI should not be required due to undue burden or cost of production. However, a court may order production despite such a showing. Privileged and work-product information that is inadvertently produced by a non-party responding to a subpoena is subject to the non-party's claim of such protection under **Rule 45(d)(2)(B)**. After being notified of such a claim, the requesting party must promptly return, sequester, or destroy the specified information and any copies and may not disclose the information until the claim is resolved. The receiving party may promptly submit the information to the court under seal for a determination of the claim. Finally, the receiving party must take reasonable steps to retrieve the information from anyone to whom it was disclosed prior to the claim of protection.

VI. Conclusion.

It should be noted that these amendments relate only to the procedures that apply in federal courts in civil cases. As of yet, there are no corresponding provisions in the Alabama rules governing such matters. However, it is not unusual for the various states to amend their rules of procedure to conform to the FRCP. Many see the adoption of these amendments regarding ESI as likely prompting routine expansive discovery requests for ESI that have only been made occasionally in the past. In anticipation of a dramatic increase in ESI discovery, a number of firms have been formed that specialize in providing legal and technical support in meeting ESI discovery obligations. Similarly, some large corporations have reportedly hired ESI discovery managers with salaries in the $300,000 range.

It is clear that preparing for ESI discovery requests and responding appropriately to them will require close and continuing coordination among University officials involved in federal litigation, the University's information technology officials and technicians, and the Office of Counsel. In order to avoid the prospect of sanctions, the University must have comprehensive procedures (the so-called "litigation hold") in place to preserve ESI and must effectively implement those procedures in a timely manner when it is reasonable to anticipate that litigation may develop to which that information is relevant.