

ESSAY

THINKING ABOUT CIVIL DISCOVERY IN ALABAMA: USING THE FEDERAL RULES OF CIVIL PROCEDURE AS A THINKING TOOL

*Carol Rice Andrews**

Litigation abuse and decreasing lawyer professionalism, particularly in civil discovery, is a popular theme at bar meetings and in the media. The focus of the outcry often is deliberate discovery abuse, where lawyers conceal or destroy information or are belligerent with opposing counsel in discovery. This type of abuse certainly occurs, but I contend that most lawyers do not intentionally abuse the discovery process. Instead, I believe that there is a more pervasive problem: lawyers do not adequately think about discovery. Many lawyers serve civil discovery requests and responses that they have not fully considered, either in terms of compliance with the governing law or in terms of application to the particular case. This discovery is done “by rote,” which, according to Webster, means done out of repetition and carried out mechanically or unthinkingly.¹

Rote discovery causes countless problems. It is unfair to clients, the judicial system, and the lawyers themselves. Rote discovery is clumsy and inefficient. It does not adequately prepare the case and wastes the client’s money. It diminishes professionalism and job satisfaction among lawyers. The cure is relatively simple: lawyers must think more about how they conduct civil discovery. They must think about the rules governing discovery. They cannot rely on memory but instead must read and re-read the rules. They must understand the rules. Lawyers must think about how the rules apply to the case at hand. They must not serve the same discovery

* Professor of Law, The University of Alabama School of Law.

1. See WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 1267 (Encyclopedia ed. 1964) (“[B]y memory alone, without understanding or thought.”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1977 (1971) (“[T]he use of the memory usually with little intelligence . . . ; routine carried out without understanding of its meaning or purpose . . .”).

requests and responses in case after case. They must tailor discovery to the facts, claims, and defenses of each case.

I am not saying that lawyers do not think at all about their discovery. Rather, my point is that most lawyers can improve discovery, and thereby help their clients and themselves, by thinking more about the rules and their case. Such independent judgment not only is a professional duty, it is a primary value that clients seek from lawyers. Clients easily can retrieve legal information and forms on the Internet, but they turn to lawyers for insight and judgment. Lawyers must do what they alone are trained to do: think like a lawyer.

This Essay is the first in a series in which I address the need for lawyers “to think.” This Essay focuses on civil discovery in Alabama.² Here, I argue that Alabama lawyers can improve their practice in both federal and state court by more carefully considering the civil discovery practice mandated by the Federal Rules of Civil Procedure. In the last sixteen years, the federal rules governing civil discovery have undergone three sets of amendments that the Alabama rules have not incorporated. Alabama lawyers should study these differences and take advantage of the innovations of the federal rules. The aim of virtually all of the federal rule changes is to encourage lawyers to think, cooperate, and be reasonable in discovery. These are positive aims for all lawyers, whether they practice in federal or state court.

Most of the new discovery procedures of federal court are adaptable to Alabama state court. Indeed, in October 2007, the Alabama Supreme Court in *Ex parte Cooper Tire & Rubber Co.* directed a state trial court to use the model of the federal rules in resolving disputes regarding discovery of electronically stored information.³ This easily can be done. The federal rule amendments regarding electronic discovery are not substantive changes but instead explicit adaptations of pre-existing discovery standards to the electronic setting. Because the Alabama rules have substantially the same framework as the pre-existing federal rules, Alabama lawyers and judges similarly may apply the Alabama rules to electronic discovery. This adaptation need not be limited to electronic discovery. The new federal rules aim to improve all aspects of the discovery process.

This is not to say that the federal rule amendments have achieved their goal in federal court. Many federal court practitioners continue to conduct

2. Because this is an essay addressing rules of procedure familiar to most lawyers, I use footnotes and formal citations sparingly. I use footnote citations in only two instances: where the source is not obvious to the reader (e.g., the advisory committee notes to a rule) or where quotation benefits the reader (e.g., the full text of a federal rule provision).

3. *Ex parte Cooper Tire & Rubber Co.*, 987 So. 2d 1090, 1105 (Ala. 2007) (ordering that on “determination as to the proper extent of discovery of . . . relevant [electronically stored information], including e-mails, the trial court should consider the recent changes to the Federal Rules of Civil Procedure”).

discovery without adequately thinking about either the rules or the case at hand. All lawyers in Alabama, whether in federal or state court, need to think carefully about civil discovery. A good starting point of that thinking process is a study of the federal rules governing civil discovery.

THE AIMS OF THE FEDERAL DISCOVERY RULE AMENDMENTS

To the casual reader of the federal rules, the amendments may seem like a confusing labyrinth of technical obstacles. A careful study of the federal rule amendments since 1993 reveals that most are designed to improve the conduct of discovery. They encourage lawyers to plan their discovery. They encourage lawyers to use discovery incrementally. They encourage lawyers to work cooperatively with the opposing side. They encourage lawyers to be reasonable. They encourage lawyers to bring more matters before the court.

The benefits of planning, incremental discovery, cooperation, reasonable conduct, and judicial involvement should be obvious, but, at the risk of stating the obvious, I will briefly highlight these benefits. First, one of the primary aims of the new federal rules is to encourage party planning of discovery. Planning helps the litigants and the courts. Planning makes discovery more effective, both in terms of cost and results. Planning increases the likelihood that lawyers will achieve the end result that they intend—whether trial, summary judgment, or settlement.

Planning also helps the lawyer personally. I liken the civil discovery process to a river voyage. Lawyers who do not plan their discovery must feel as though they are drifting aimlessly in this voyage and at times they may feel as though they are cascading out of control in churning rapids. A lawyer who plans his discovery may not feel in control all of the time, but at least he feels as though he has a boat, a paddle, and a destination.

A second aim of the federal rules is incremental use of discovery. Incremental discovery is a combination of ongoing planning and reaction to discovery. It consists of asking limited, basic questions early in the discovery process, followed by another set, and so on. The lawyer uses his prior discovery to frame later discovery. It is the opposite of the more typical scenario, in which the requesting lawyer asks for all possibly relevant information in an early onslaught of broad discovery requests.

Incremental discovery is less burdensome on the responding party, which means that the requesting party will receive far fewer burden objections and will be able to better respond to the few objections that it does receive. Moreover, incremental discovery prevents information overload, which often is worse than any objection. When a lawyer cannot adequately process information gained in discovery, his discovery is as useless as having no discovery at all, and it is far more expensive.

A third aim is party cooperation. Cooperation and communication are aims that lawyers often talk about but rarely achieve. In practice, many lawyers launch discovery blindly without ever communicating with the other side. This is misguided. Lawyers can learn much about the case by simply talking to opposing counsel. This is not an illicit communication or a rookie mistake by the opposing counsel, but instead a means by which both sides benefit. Communication allows both parties to frame more targeted requests that in turn make the response more efficient and less burdensome. In most cases, lawyers can ease and improve the discovery process by early identifying and attempting to resolve recurring issues, whether substantive (e.g., the relevance of a particular line of inquiry) or procedural (e.g., waiver of privilege).

The goal of reasonable behavior likewise is an aim that most lawyers acknowledge but often do not achieve. Lawyers take extreme positions without thinking about the need for or repercussions of that position. Such behavior frequently results from lack of planning and cooperation, but reasonableness in discovery is a broader concept. It means taking reasonable positions on discovery issues rather than pushing the limits of advocacy.

Discovery operates under a form of honor code that requires the lawyers to moderate their own behavior. Without self-governance, the discovery process does not work effectively or fairly for either side. No amount of judicial supervision can remedy unreasonable behavior by lawyers. Many lawyers complain that judges refuse to get involved in discovery. Judicial refusal to make decisions in discovery disputes may be a real problem in some courts, but no judge can rule effectively in a case in which the issues and facts are not sufficiently presented and narrowed. In order to get relief in a discovery dispute, the lawyers and parties must behave reasonably.

This leads to the final aim—judicial oversight. As noted, many lawyers could better facilitate judicial involvement, but, under the new federal regime, judicial involvement no longer means failure of the parties to properly conduct discovery. To the contrary, the federal rules view judicial involvement as an essential element of the proper conduct of discovery. The new federal rules seek to increase judicial involvement through several two-tiered discovery procedures. In the first tier, the parties may conduct discovery within specified limits, and any discovery beyond these limits—the second tier—is a question for the court. That a party seeks discovery in the second tier does not mean that either lawyer acted inappropriately. Such discovery very well may be proper, but the court must make that determination. Lawyers must recognize and respect the mechanics of the two-tiered procedures. As in all discovery matters, they must plan and act reasonably.

These aims are not unique to the current federal rules. To varying degrees, earlier versions of the federal rules (and the Alabama rules) had these aims. The innovation of the three sets of federal amendments since 1993 is that the federal rules now more overtly require or encourage planning, incremental discovery, cooperation, reasonable behavior, and judicial involvement. The federal rules have not achieved perfection, but they bring lawyers and parties closer to these aims through a variety of procedural requirements.

MANDATORY CONFERENCING AND SCHEDULING ORDERS

The federal rules now require the parties to confer early in the case, first with each other and then with the court. Federal Rule 26(f) states that “parties must confer as soon as practicable,” and that in this conference they “must consider” discovery issues such as preservation of information and “must . . . develop a proposed discovery plan.”⁴ The importance of this mandatory planning conference is underscored by Rule 26(d), which prohibits the parties from initiating any discovery until after the conference. After the parties confer, Rule 16(b) requires the court to hold a conference with the parties and enter a scheduling order. That order must set a discovery cut-off date and may dictate other discovery matters, such as modifications on the extent of discovery, explicit procedures for discovery of electronic information, and procedures for asserting claims of privilege (or waiver of privilege).⁵

4. Federal Rule 26(f)(3) mandates:

A discovery plan must state the parties’ views and proposals on:

- (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;
- (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;
- (C) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;
- (D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;
- (E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- (F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

FED. R. CIV. P. 26(f)(3).

5. FED. R. CIV. P. 16(b)(3). Federal Rule 16(b)(3)(B) provides:

The scheduling order may: (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1); (ii) modify the extent of discovery; (iii) provide for disclosure or discovery of electronically stored information; (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced

FED. R. CIV. P. 16(b)(3)(B).

Alabama has similar conferencing provisions, but they are not mandatory. Alabama Rule 26(f) provides that “the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery.” Similarly, Alabama Rule 16(b) provides that the “court may enter a scheduling order that limits the time . . . to complete discovery.” Moreover, the Alabama rules do not require the parties to confer before they commence discovery.

Alabama lawyers should not treat early planning conferences as optional in state court. The mandatory conferencing provisions of the 1993 federal rule amendments were so successful that federal rulemakers in 2000 removed the ability of districts to opt out of conferencing by local rule.⁶ Lawyers in state court should take this cue and initiate conferencing on their own. They can use Federal Rule 26(f) as an initial checklist for topics to discuss in their state court conferences. They can use the mandatory provisions of Federal Rules 16(b) and 26(f) as support for their requests to state court judges to use their discretion under Alabama Rule 16(b) and require such conferences and planning. Likewise, lawyers in federal court should not view the mandatory sessions as mere gesture. They should take advantage of this opportunity to think about and plan their discovery and develop a meaningful plan of action.

PRESUMPTIVE LIMITS ON INTERROGATORIES AND DEPOSITIONS

A second way in which the federal rules promote better planning of discovery is through the use of presumptive numerical limits. Federal Rule 33 limits the number of interrogatories to twenty-five. Rule 30 limits the number of depositions to ten per side. Rule 30 also limits the length of depositions to one seven-hour day. Presumptive limits are two-tiered devices, in that the requesting party is entitled to the discovery within the stated limit without court order (the first tier) and may get additional discovery only with leave of court (the second tier).

The federal rules did not invent presumptive limits. Indeed, before the federal courts did so, Alabama courts in 1990 imposed a presumptive limit of forty interrogatories, in response to “the concern for abuse by the propounding of ‘canned’ interrogatories.”⁷ The Alabama limit has not been universally popular. Some Alabama lawyers complain that the limit is arbitrary and/or not enforced.

Lawyers and judges must realize that presumptive limits are positive devices—for both the requesting and responding parties. Presumptive lim-

6. FED. R. CIV. P. 26(f) advisory committee’s note (2000) (“The Committee has been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore has determined to apply the conference requirement nationwide.”).

7. ALA. R. CIV. P. 33(a) committee comments (effective Oct. 1, 1990).

its are not arbitrary restrictions but instead legitimate means to control and focus discovery—if used correctly. Parties should not routinely stipulate out of these limits. Courts should not routinely change the limits in the initial scheduling order. Courts should not have a practice of routinely granting or denying later motions for extensions beyond the limits. Each party must consider themselves governed by the presumptive limit and conduct their discovery accordingly. If the lawyer thinks carefully about his first twenty-five (or forty) interrogatories, he may never need to file a motion for leave to serve additional interrogatories. On the other hand, if and when he finds himself in need of additional interrogatories, his judicious use of the first allotment should be a key factor in the court's decision to grant additional interrogatories.

This means that lawyers must plan and really think about each interrogatory they serve. They should treat the interrogatory as a precious commodity. Waste of interrogatories is legendary. Most lawyers have seen extreme examples—interrogatories in a commercial case requesting medical or smoking history of a corporate entity—but lesser examples of inapt interrogatories recur with alarming frequency. Such lack of thinking is inexcusable, but proper use of interrogatories requires more thought than merely avoiding obviously inapt interrogatories.

Judicious use of interrogatories requires lawyers to realize the inherent and practical limits of the interrogatory device. A well-known practical reality of interrogatory practice is that the opposing lawyer controls the substantive answers. This means that interrogatories asking for narratives usually are wasted efforts. By contrast, interrogatories as to the opponent's contentions or claims are productive precisely because the opposing lawyer is drafting the substantive response. Likewise, interrogatories as to basic facts, such as dates and names, are effective because the opposing lawyer often knows these facts first-hand and cannot easily distort the substantive answers.

In addition, a thinking lawyer will not use up his allotted interrogatories early in the discovery process. He will save some interrogatories for later in the case. This staggered use of interrogatories is part of the practice of incremental discovery. Moreover, some interrogatories are substantively more effective near the end of the discovery period. For example, an interrogatory paired with a request to admit, served late in the discovery process, can be an effective tool to prepare for trial or summary judgment.⁸ In addition, as I explain below, some interrogatories are necessary

8. The pairing might be as follows:

Request to Admit #5: Admit that the [description] contract is valid.

Interrogatory #21: If the answer to Request to Admit #5 is any statement other than an unequivocal admission, please state the factual and legal bases for your failure to admit that the contract is valid.

late in discovery to compensate for gaps in the duty of supplementation. The presumptive limit on interrogatories is not at odds with this need for late use of interrogatories. To the contrary, presumptive limits should motivate lawyers to think more carefully about interrogatories, both in terms of content and timing.

Presumptive limits also can benefit deposition practice. Alabama state courts do not put a presumptive limit on depositions, but all Alabama lawyers should take the signal from the federal rules and limit their use of depositions in terms of both quantity and length. Depositions are costly. There is no need to depose every person with potential information. It is a waste of time and money and often ineffective strategy. Interviews, supplemented in some cases by witness statements, may be enough to serve the client's needs. Once the lawyer identifies the deponents, the conduct of the depositions requires extensive planning. Lawyers must prepare and think about the broad issues (e.g., the ultimate aims of the deposition and its place in the specific litigation), lines of questioning (e.g., the different ways to get a particular point), and technical issues (e.g., use of documents). Such planning can reduce the length of most depositions to well within a single day.

Presumptive limits do not work the same benefits for all forms of discovery. For example, the federal rules wisely do not place presumptive limits on document requests. Such limits might encourage lawyers to make very broad requests rather than narrowly tailored requests. By not putting presumptive limits on document requests, the federal rules give lawyers greater freedom to serve precise requests and incrementally ask for documents.

AUTOMATIC DISCLOSURES

The most controversial amendment to the federal discovery rules was the 1993 addition of automatic disclosures. Automatic disclosures require a party to produce information even though the opposing party has not yet served a formal discovery request. Because the duty to disclose is automatic—a departure from the traditional request-based format—many lawyers have had difficulty adjusting to the concept. The automatic disclosure duty, however, has important aims and benefits.

One aim of the initial disclosure duties is incremental discovery—the information gained in the initial disclosures enables the receiving party to better frame later discovery requests. Another aim is to reduce unnecessary paperwork by requiring automatic disclosure of material that most lawyers otherwise would request through formal discovery.⁹ The disclo-

9. FED. R. CIV. P. 26(a)(1)(A) advisory committee's note (1993) ("A major purpose . . . is to accelerate the exchange of basic information . . . and to eliminate the paper work involved in request-

sure duties are relatively modest. The two generic initial disclosure provisions are limited to only material favorable to the disclosing party. Federal Rule 26(a)(1), requiring a listing or persons with knowledge of information¹⁰ and a description or production of documents,¹¹ limits these disclosures to information and documents that the disclosing party may use to support its case. The remaining two initial disclosure provisions are targeted to specific types of information commonly sought in litigation. Rule 26(a)(1) requires disclosure of basic information concerning any party's damages claims and liability insurance policies. Federal Rules 26(a)(2) and (3) similarly provide for automatic disclosure, later in the case, of common expert and final trial materials.

The disclosure provisions should inform the practice of all lawyers in Alabama, in both state and federal court. Lawyers in Alabama state court need not advocate for adoption of automatic disclosure duties, but they should use the federal disclosure provisions as a cue for their request-based discovery. They should follow the example of the disclosures and use their requests incrementally, asking for information similar in substance to the federal disclosures. After all, the federal rulemakers deemed this information so fundamental as to warrant production in almost every federal civil case.¹² Alabama lawyers should not do so unthinkingly. They should not mirror exactly the federal disclosure provisions but instead consider a similar but broader request—for example, an interrogatory asking for persons with knowledge of key events, not just the persons with information favorable to the other side. For the same reasons, lawyers in federal court must realize that the automatic disclosure provisions are narrow and are not substitutes for broader discovery requests.

SUPPLEMENTATION

Federal rulemakers added the original supplementation duty in 1970, after much confusion and controversy about a party's duty to update or correct its prior discovery responses. The 1970 federal rule, now embodied in Alabama Rule 26(e), was a compromise. It signaled its limited requirements by speaking in negative terms (“no duty to supplement . . .

ing such information . . .”).

10. FED. R. CIV. P. 26(a)(1)(A)(i) (“[T]he name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment.”).

11. FED. R. CIV. P. 26(a)(1)(A)(ii) (“[A] copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”).

12. FED. R. CIV. P. 26(a)(1)(A) advisory committee's note (1993) (describing the disclosure duty as applying to “certain basic information that is needed in most cases”).

except”).¹³ In 1993, the federal rules enhanced the duty. The current federal rule speaks in positive terms (“a party . . . must supplement”) and requires lawyers to update and correct all responses, except deposition testimony.¹⁴

The supplementation duty requires careful consideration not only by the lawyer for the responding party but also by the requesting lawyer. The responding lawyer must make certain that his client is in compliance with the duty, and the requesting lawyer must ensure that his discovery is phrased and timed such that he gets the most complete response possible. This understanding is particularly important for Alabama lawyers who face different duties in federal and state court.

The difference in duty means that lawyers in federal court may send, early in discovery, an interrogatory asking the opponent to flesh out the factual bases for allegations in pleadings, knowing that the opposing lawyer must update the response as he learns more in discovery. Lawyers in state court will not be as sure. They must wait and serve some interrogatories near the end of discovery, in order to ensure complete responses, but they also must not serve the interrogatories so late that they cannot react to the answers. For example, a lawyer in state court must time an interrogatory concerning the opponent’s damages claims late enough so that the response is complete but early enough to allow the requesting lawyer to conduct discovery as to the damages claims.

Alabama lawyers can avoid this uncertainty by stipulating that both sides will supplement their discovery responses. Alabama Rule 26(e) encourages such agreements. It expressly provides that the parties may enhance the duty of supplementation through party agreement or order of the court.¹⁵ The federal duty is an easy model to adopt.

13. ALA. R. CIV. P. 26(e) (limiting duty to supplement to expert discovery, “the identity and location of persons having knowledge of discoverable matters,” and to other responses where the responding 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”).

14. Federal Rule 26(e)(1) provides in part:

A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing

FED. R. CIV. P. 26(e)(1)(A).

15. ALA. R. CIV. P. 26(e)(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.”).

ELECTRONIC DISCOVERY

In 2006, federal rulemakers amended virtually every rule governing discovery in order to better address discovery of electronically stored information (ESI). Most of these amendments are modest in that they adapt existing discovery standards to ESI rather than change the substantive standards. The most significant new federal rule governing electronic discovery is Rule 26(b)(2)(B).¹⁶ It is a two-tiered device that focuses on searches of electronically stored information. It directs the responding party to search all sources of ESI that are reasonably accessible, in terms of cost and burden, and produce all responsive information from those sources. The responding party does not have to search sources that are not reasonably accessible but instead must identify the sources not searched in its response. The requesting party then must assess whether it is satisfied with the produced information and the search. If not, the requesting party must bring the matter before the court to decide whether the responding party must search the other sources and which party must pay for that search.

This is the procedure that the Alabama Supreme Court identified in *Ex parte Cooper Tire & Rubber Co.* as a good model for state court judges to follow. State judges and lawyers can use Alabama Rule 26(b)(1) to employ this procedure. Alabama Rule 26(b)(1) provides for balancing of the benefit and burden of any form of discovery.¹⁷ Prior to 2006, federal courts used this balancing provision to address ESI discovery disputes. New Federal Rule 26(b)(2)(B) essentially is a standardized application of that balancing test to a particular issue—sources that are not reasonably searchable.

The 2006 federal rule amendments also added provisions addressing the form in which a party must produce ESI. The form of production—whether, for example, in hard copy, portable document format (PDF), or original (native) software—is a recurring problem with ESI. Federal Rule 34(b) allows the requesting party to specify the form of production, and the rule also permits the responding party to object to the requested form

16. Federal Rule 26(b)(2)(B) provides:

A party need not provide discovery of electronically stored information from sources that the party identifies 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, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

FED. R. CIV. P. 26(b)(2)(B).

17. Alabama Rule 26(b)(1) instructs the court to limit discovery when “the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.” ALA. R. CIV. P. 26(b)(1). An almost identical provision remains in Federal Rule 26(b)(2)(C).

and state an alternative form of production. Rule 34(b)(2)(E) sets a default standard for requests that do not specify the form: the responding party may produce in the form in which the ESI is ordinarily maintained or in any other reasonably usable form.

Federal Rule 37, the rule governing discovery sanctions, added a modest provision addressing preservation of ESI. The amendment “focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use.”¹⁸ Rule 37(e) directs a court not to impose sanctions on a party for failure to provide ESI “lost as a result of the routine, good-faith operation of an electronic information system.” This addition acts more as a reminder than a substantive change. By definition, it applies only to reasonable behavior, which courts rarely should sanction in any application. Yet, the new rule is an important reminder of a recurring problem—ESI preservation—and the need to be reasonable.¹⁹

ESI easily can overwhelm lawyers, clients, and judges. Because ESI is an application that is evolving in terms of law, technology, and awareness, the need for reasonableness is particularly profound. The federal provisions are reasonable solutions to some of the vexing problems of ESI—solutions that lawyers practicing in state court should consider. ESI discovery is not unique to federal court. ESI issues arise in all cases. Alabama lawyers should take the cue from the federal rules, but they should not limit themselves to the particular solutions of the federal rules. They should consider and be reasonable with respect to all aspects of ESI discovery, whether in federal or state court. A lawyer, for example, should assess what information his client actually needs and not insist upon an exhaustive search of every byte of information.

PRIVILEGE WAIVER

The 2006 federal amendments added another two-tiered device to address a recurring issue of privilege—inadvertent waiver. This addition was part of the electronic discovery amendments, but the issue is not unique to ESI. Privilege waiver always has been a risk in discovery—causing costly

18. FED. R. CIV. P. 37(f) advisory committee’s note (2006).

19. The advisory committee highlighted preservation of ESI as a particularly important issue to discuss in the initial conferences:

The parties’ discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party’s routine computer operations could paralyze the party’s activities. The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

FED. R. CIV. P. 26(f) advisory committee’s note (2006) (citation omitted).

and time-consuming privilege review—but the large volume and dynamic nature of ESI compound the risks, costs, and delays.²⁰

Federal Rule 26(b)(5)(B) sets a new procedure for addressing inadvertent production and belated claims of privilege. First, the rule provides that a party who has produced a document but who claims privilege on the document must notify the other side. Upon receiving such notice, the receiving party has a choice: destroy or return the document, or bring the privilege and waiver issue before the court. If the receiving party chooses to bring the issue before the court, the receiving party must sequester the document and not use it until judicial resolution. The federal rules do not address the substantive waiver decision, but Rule 26(f) and Rule 16(b) encourage the parties and court to consider establishing both procedural and substantive waiver standards early in the case.

The Alabama rules do not address the procedure for addressing late assertions of privilege and related claims of waiver. Yet, lawyers in state court either can agree themselves to use the federal procedure or ask the state court to order such procedure. At a minimum, the federal provisions are a reminder to lawyers practicing in state court to consider and discuss such procedures and issues early in the case.

CONCLUSION

The federal rules governing civil discovery are a good starting point for all lawyers in their effort to think more fully about their discovery practice. For lawyers practicing in federal court, the new rules are required procedures that in every case warrant careful study and reflection. For lawyers practicing in state court, the new federal rules are a useful comparative study to better understand the Alabama state court rules. The federal rules also act as a cue to possible procedures and behavior that will improve discovery in state court. Whether conducting discovery in federal or state court, study of the federal discovery rules will help Alabama lawyers fulfill their basic duty: thinking like a lawyer.

20. FED. R. CIV. P. 26(f) advisory committee's note (2006) ("The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. . . . The volume of [ESI] data, and the informality that attends use of e-mail and some other types of [ESI], may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming.").