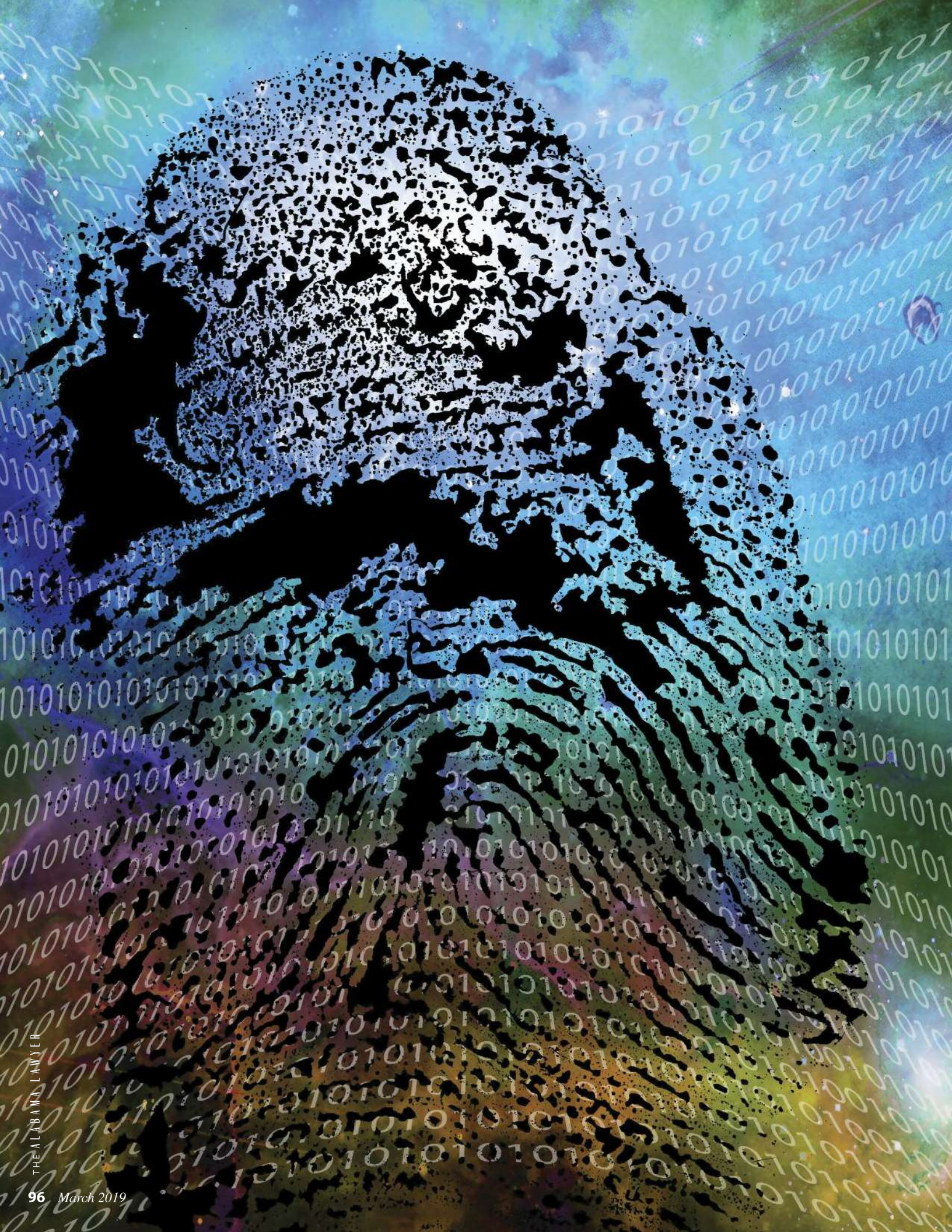

Alabama Supreme Court Amends Rules 26 and 37 to Address Proportionality and ESI

By Gregory C. Cook and Sloane M. Bell

The Alabama Supreme Court recently adopted important amendments to the Alabama Rules of Civil Procedure effective December 21, 2018. For the most part, these parallel the changes to the Federal Rules of Civil Procedure (Rules 26 and 37) in December 2015. The amendments include: (1) adding a proportionality standard in the definition of the scope of discovery, (2) expressly allowing courts to allocate discovery expenses in the context of a protective order and (3) instituting a new and complete framework for addressing a party's failure to preserve electronically-stored information ("ESI").

Discovery's New Scope–Rule 26(b)(1) Adds Proportionality

Rule 26(b)(1) sets forth the permissible scope of discovery in Alabama courts. Prior to the December amendments, proportionality was not part of Rule 26(b)(1). Instead, proportionality was only one of the considerations that a court could use to limit discovery under Rule 26(b)(2)(B). Thus, proportionality only became an issue if a motion was made for a protective order under Rule 26(c) (or if the court acted "upon its own initiative").

The amendment moves all proportionality factors to Rule 26(b)(1), which is the portion of Rule 26 which defines the *scope* of discovery. Rule 26(b)(1) now provides, in relevant part: "Parties may obtain discovery regarding any matter, not privileged, which is: relevant…and proportional to the needs of the case."

As the Committee Comments make clear, one reason for this move was to emphasize the importance of proportionality to all parties and the trial court. The Committee noted the information explosion and the potentially crippling costs for discovery and sought to "highlight the need to size discovery to the needs of a particular case." *See* Ala. R. Civ. P. 26(b), Comm. Cmts. This change underscores that proportionality is required and not optional.

The amendment specifies six factors to consider in deciding proportionality. These factors follow the federal rule exactly, and the Committee Comments indicate that federal caselaw is expected to be helpful in applying these factors. The six factors are: (1) "the importance of the issues at stake in the action," (2) "the amount in controversy," (3) "the parties' relative access to relevant information," (4) "the parties' resources," (5) "the importance of the discovery in resolving the issues" and (6) "whether the burden or expense of the proposed discovery outweighs its likely benefits."

Four of these factors were previously part of Rule 26(b)(2)(B) (but were slightly reworded) and two of these factors are new. These two new factors are: (1) the parties' relative access to relevant information and (2) the importance of the discovery in resolving the issues. As to the first of these new factors, the Committee Comments explain that parties may not have the same "access" to relevant information and therefore one party may need more discovery (this is referred to as "information asymmetry"). Thus, the fact that one party has produced more discovery than another party (for instance, an "individual plaintiff") is not necessarily indicative that discovery is not proportional. As to the second of these new factors, the Committee Comments explain that the "importance of the discovery in resolving the issues" was implied in the prior wording regarding the "needs of the case" from Rule 26(b)(3)(B)(iii).

The Committee Comments (as well as the Advisory Committee Notes for the federal rule) include a helpful discussion of the meaning of these factors. Notably, federal law indicates that the weight of these factors can vary from case to case (and request to request) and thus that the order of these factors in the Rule is not indicative of their importance.

The Committee Comments also state that "[a]ll parties should share the responsibility to honor these limits," and that the size of that responsibility may shift throughout the discovery process. For instance, the party requesting the discovery may have little information on the extent of the burden posed by particular discovery requests at the time the requests are issued. Conversely, the responding party may have little information on the importance of the discovery in resolving issues as understood by the requesting party. The parties should communicate during the discovery process and revise their positions accordingly. The responding party should considering explaining the burden rather than standing on boilerplate objections; the requesting party should explain why the discovery is important to the relevant issues during the meet-and-confer process. Again, it is clear that under the revised Rule, all parties now have a collective responsibility to consider proportionality on the front end and to provide the trial court with all appropriate information if they cannot reach a resolution.

The impact of this rule change should be small in routine cases. Proportionality is normally self-evident in such cases. In short, most cases will still rely on self-regulated discovery where the parties come to mutually-agreeable terms without court involvement. But, as noted by the Committee, the proportionality factors will be of particular importance for more

complex cases, including commercial disputes, class actions, multiparty actions, product liability actions and actions involving electronic discovery. It is those cases where this amendment will save parties and the judicial system significant time and money. With advances in technology come the increased costs of discovery, as well as the potential weaponization of the discovery process or to utilize the process as a stall-tactic. Given these considerations, the Committee recognized the need for judicial involvement in the more complex cases and provided the trial court with a detailed standard for making proportionality determinations.

Another change to Rule 26(b)(1) was the removal of specific examples of discoverable information, 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 matters." The Committee justified this deletion by noting the discovery of such matters is so deeply entrenched in practice that it is no longer necessary in an already lengthy Rule.

It should be noted that the Alabama amendment did not adopt the changes in the federal rule which narrowed the definition of relevant discovery. In the Alabama version of Rule 26(b)(1), discovery must be "relevant to the *subject matter* involved in the pending action." The federal version of Rule 26 previously included the same language, but narrowed this language in an amendment in 2000 to state "relevant to any *party's claim or defense*." The 2015 amendment to the federal version of Rule 26 eliminated the traditional "reasonably calculated" language in Rule 26(b)(1), thus arguably narrowing relevancy further. This change was also not made in the Alabama amendments and Ala. R. Civ. P. 26(b)(1) still reads: "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Notably, discovery must be both "relevant . . . *and* . . . proportional." Thus, while the difference in the wording regarding relevancy may affect some discovery battles, it will not affect the independent requirement that discovery be proportional (and therefore federal caselaw on proportionality should be persuasive for Alabama courts).

Rule 26(c) Changed to Expressly Authorize Trial Courts to Allocate Discovery Expenses

Rule 26(c) governs the instances for which an Alabama court can issue a protective order, which may limit discovery in a case or even forbid certain discovery outright. Protective orders under this Rule protect responding parties from "annoyance, embarrassment, oppression, or undue burden or expense." To further this purpose, the Rule includes several measures a court can take when crafting a protective order. For example, a court may forbid the discovery sought altogether, order that a deposition be sealed and only opened on court order and limit discovery to a certain method.

Under the amendment, Rule 26(c) remains almost unchanged. The Committee's only substantive addition is providing the trial court with the express power to condition discovery upon the allocation of expenses of that discovery between the parties (allowing the court to order under Rule 26(c)(2) "the allocation of expenses"). In most cases, the amendment should not change the traditional Alabama practice that discovery expenses are borne by the responding party, because the "allocation of expenses" is only allowed upon the making of a motion for protective order and "good cause shown."

This change should be important in dealing with proportionality. For instance, this new authority allows the trial court to allocate some (or all) of the costs of discovery as a method to balance proportionality between the parties. This may be especially useful when the parties disagree about the true cost or the true importance of discovery. The authority would also seem to allow creative options for the court (for instance, dividing the costs, phasing the costs, taxing the costs to the losing party, tying cost allocation to the actual use of any discovery during trial, etc.). This change will also be helpful with respect to allocating costs of restoring or replacing lost ESI, which is governed by Rule 37(g) (see below).

Though the Rule may have implicitly allowed for the allocation of costs, the Committee sought to clarify the trial court's authority to allocate costs by including express language in the Rule because of the large potential costs associated with ESI, ensuring a more equitable process.

New (Complete) Roadmap for Loss of ESI

Rule 37(g) deals with sanctions for the loss of ESI. In 2010, the Alabama Supreme Court adopted Rule 37(g) which was consistent with the 2006 changes to its federal counterpart (FRCP 37(e)). However, since that time, the information explosion has continued and the courts (especially the federal courts) have encountered an avalanche of motion practice regarding ESI discovery and ESI sanctions. The prior version of Rule 37(g) led to conflicting federal precedent, caused parties to incur significant time and expense in ancillary disputes, threatened to confuse juries and had the potential to cause litigants to spend significant time and money on excessive preservation.

In December 2015, the federal version of Rule 37(g) was completely rewritten. The Alabama amendment adopts almost entirely the federal version, but provides helpful clarity on who should make the threshold determinations laid out in Rule 37. The Alabama Committee believed that the changes "provide specificity regarding the circumstances under which sanctions may be imposed when ESI is lost through negligence and when it is intentionally destroyed for the purpose of depriving the opposing party of its use." *See* Comm. Report, Sept. 21, 2018. These changes now provide a clearly defined, comprehensive roadmap.

The old Rule 37(g) was very narrow and only addressed one specific safe harbor: if a loss of ESI was a result of the "routine, good faith operation" of a party's computer system and there were no exceptional circumstances, the loss of ESI was not sanctionable. The prior version simply didn't speak to any other ESI situations, leaving courts without clear guidance.

Now, Rule 37(g) provides for a far broader inquiry by the court and a full roadmap to follow when dealing with the failure to preserve ESI. It essentially provides a flow chart for the trial court in deciding how to handle a loss of ESI.

Three-Part Test for the Nonintentional Loss of ESI

Under the new Rule, the first question is whether ESI "that should have been preserved in the

anticipation or conduct of litigation" was lost. For instance, if the information is not relevant (or not proportional), then this test would not be satisfied.

Second, the loss of the ESI must be "because a party failed to take reasonable steps to preserve it." The focus is on whether the steps were "reasonable" and therefore is an objective test.

Third, the ESI must be unable to be "restored or replaced through additional discovery." In other words, if ESI can be replaced or restored, it should be (given proportionality in Rule 26), and there will be no need for further consideration of sanctions.

If these three tests are met, the court must next consider whether there is "prejudice." If so, the trial court may only "order measures no greater than necessary to cure the prejudice" (assuming that the loss was not intentional). The Rule focuses upon advancing the merits of the litigation–attempting to cure the prejudice so that the merits of the case can be decided. The trial court's discretion under Rule 37(g)(1) includes the authority under Rule 26(c) to allocate the expenses of replacing or restoring the lost information. Importantly, the trial court should only order those measures that are proportional to the information lost. For example, if a small amount of relatively unimportant information is lost, the court should not order the restoration of such information if doing so would require great expense. Such a high cost of recovery would not be proportional to the information lost, as required by the Rule.

Rule 37(g) does not assign the burden of proof for proving prejudice. The Committee Comments state: "[t]he rule does not specify which party bears the burden of proving prejudice… This is left to the discretion of the trial court." The Committee Comments also quote the Advisory Committee Notes to the federal rule observing that the ease or difficulty of showing prejudice can vary between particular cases.

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Destruction of ESI with "Intent to Deprive Another Party of Use"

However, if the party "acted with the intent to deprive another party of use of the information in the litigation" (*and those three tests are met*), additional sanctions are possible. Those options available to the trial court include: (a) presuming that the lost information was unfavorable to that party, (b) instructing the jury that it may ***or*** must presume that the information was unfavorable to that party, and (c) dismissing the action (if the intentional deprivation is by a plaintiff) or entering a default judgment (if the intentional deprivation is by a defendant).

It is important to emphasize the high level of intent that must be found to apply the sanctions in Rule 37(g)(2). Anything short of the specific intent to deprive the other party of the use of the ESI ("in the litigation") is insufficient for application of 37(g)(2). Notably, the Rule includes only two levels of culpability for the loss of ESI–intentional and nonintentional. Anything short of this specific intent must be dealt with under Rule 37(g)(1) which focuses upon avoiding prejudice rather than applying a punitive sanction.

Rule 37(g) does not provide for sanctions if the discovery is not "lost." As the Committee Report to the supreme court explained:

> The Committee considered whether to diverge from F.R.C.P. 37 and recognize the power of the trial court to impose punitive sanctions if a party intentionally destroys ESI, but the information is restored or replaced. After discussing this issue at length, the Committee voted not to do so. The Committee felt that practitioners would benefit from uniformity of the Alabama and federal rules regarding discovery of ESI and the ability to rely on federal precedent. Further, the Committee worried about distracting the jury and occupying the time of the parties and the Court on non-merits

issues. The trial court retains its inherent authority to allow the jury to consider evidence of intentional destruction if it is relevant to the merits, rather than a sanction.

Who Decides?

While these changes largely follow the changes to FRCP 37, the Alabama Comments include an important clarification regarding who decides whether the threshold tests in Rule 37(g) have been met. Neither Fed. R. Civ. P. 37 nor its Committee Notes expressly state whether the judge or the jury makes the determinations under the Rule. However, the Alabama Committee Comments are clear that the trial court makes the determination of whether the threshold factors in Rule 37(g) have been satisfied and decides which sanction to impose. ("The amendment to our Rule 37(g) requires that the court, not the jury, determine not only whether the lost information should have been preserved, whether the loss resulted from a failure to take reasonable steps to preserve it, and whether it can be replaced or restored, but also whether another party has been prejudiced... and what measures should be taken to cure…"). Further, the Committee Comments state regarding Rule 37(g)(2) that the "Alabama rule requires that the court make the finding whether the relevant information was lost intentionally…"

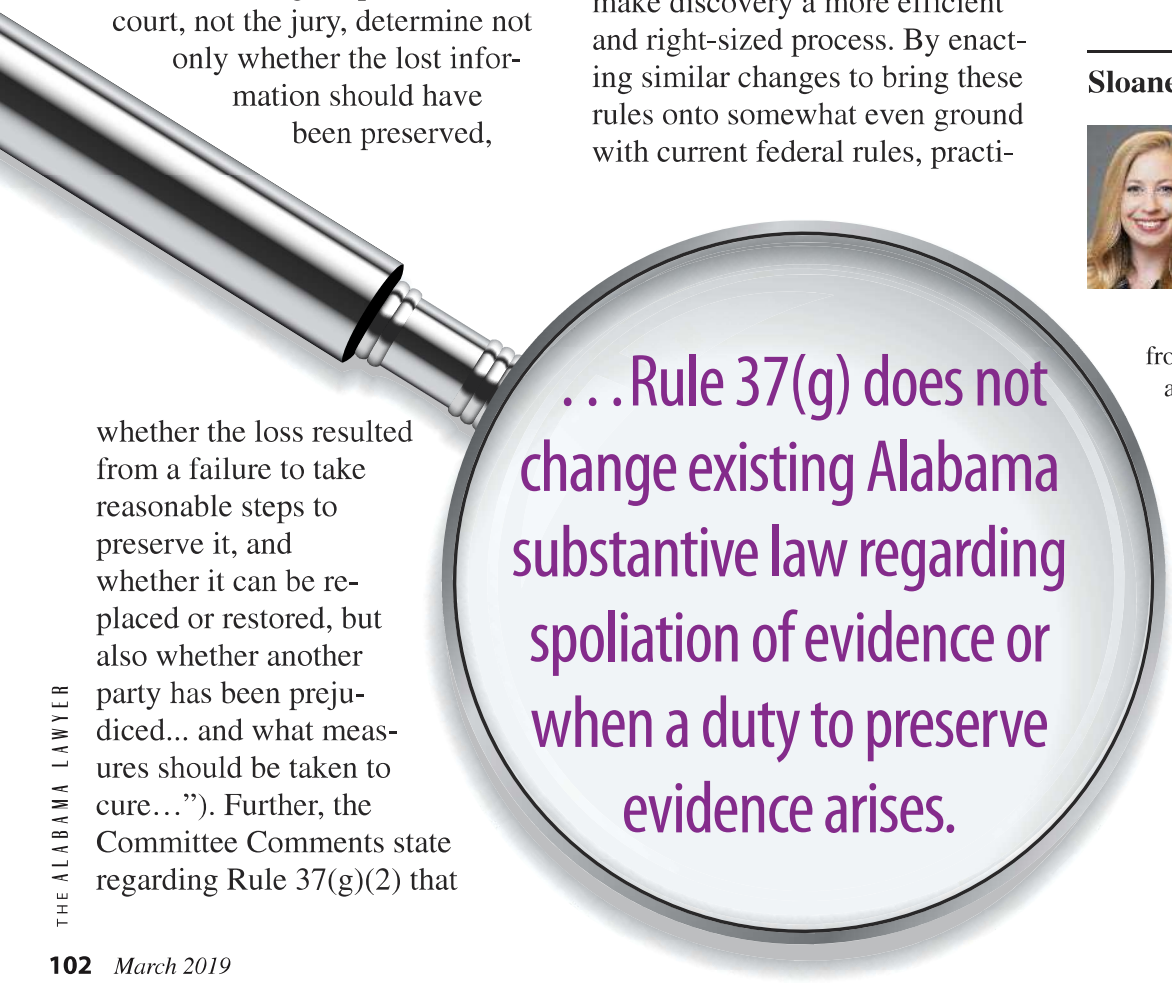
What Rule 37(g) Does And Does Not Do

The adoption of Rule 37(g) is intended to provide a complete roadmap for ESI sanctions issues and thus "forecloses reliance on the inherent authority of the court to determine when certain measures should be used."

However, Rule 37(g) does not change existing Alabama substantive law regarding spoliation of evidence or when a duty to preserve evidence arises. Further, rule 37(g) only addresses ESI.

Conclusion

The recent amendments to Ala. Civ P. 26 and 37 are intended to make discovery a more efficient and right-sized process. By enacting similar changes to bring these rules onto somewhat even ground with current federal rules, practitioners and courts will hopefully find more direction and efficiency as we head into 2019. While these rule changes should make little impact on routine cases, it is very important that Alabama trial courts have these new tools to handle complex litigation when it inevitably arises. ▲



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