# Mississippi's New Limitations on the Discovery of Electronic Data

By John P. Sneed and Justin L. Matheny*

The unpleasant question that nags at the back of the Mississippi practitioner's mind as he or she either conducts or responds to discovery at a time in which the unprecedented growth - and freedom - in personal and corporate communications and information storage and retrieval methods intersects head-on with mass tort hysteria is, "How can I be *sure* that I've gotten *everything* I've asked for?", whether from opposing counsel or the client. To be sure, this is not a new question, nor is it one prompted only by the glut of information that even the most techno-averse lawyer finds at his or her fingertips. But this question arises with more and more frequency in this age of electronically stored information, and the seemingly infinite amount of data and meta-data, or bytes and megabytes (to name just a "bit"), which create a very real potential for discoverable information overload.

In the eye of the litigation storm, the attorney expecting a wealth of documentary "smoking guns" from her finely-crafted discovery requests might well pause to wonder, when the return mail brings a paucity of relevant documents, just where those "missing" e-mail chains are in which mid-level executives gnash their collective teeth over the dismal performance of their company's product in internal safety trials. Where, she might ask, are the statistical tables parsing the cost - down to the tenth of a penny - of building a "child-safe" widget? Where, indeed, are the reams of research data supporting [or undermining] the company's risk-utility analysis? And, if the attorney is attempting to faithfully respond to his adversary's rather pointed document requests, only to be met with the blank stares of his client's employees, he might well begin to question whether that client has been entirely forthcoming in its responses.

Until recently, attorneys in Mississippi conducting and responding to discovery aimed at electronically-stored data did so with little assurance that the net they cast would be broad enough, or specific enough, to bring in evidence that literally does not exist "on paper." Moreover, in those cases in which certain discoverable information was *known* to exist in an electronic format, the practitioner could expect a long, and likely an expensive, battle to compel production of that material. In actual practice, electronic data has long been given short shrift, if not completely overlooked, by both requesting and responding attorneys in the conduct of discovery in "routine" cases - *i.e.*, in those cases in which *known* electronic data was not itself in issue. While document requests would frequently net some printed e-mail exchanges, anything approaching a systematic search of the responding parties' e-mail database has been the rare exception, in the experience of this practitioner.

Indeed, as in the federal court system, the discovery of electronic data - "e-discovery" - in Mississippi was, until mid-2003, governed solely by the civil procedure rule permitting and requiring the production of "documents." That rule in Mississippi is Miss. R. Civ. P. 34, which, like its federal counterpart, deals with the production of "documents and things and entry upon land for inspection and other purposes." Of course, Rule 34 has long permitted the inspection and copying of, in addition to "hard" documents, any "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form."[1] And, in practice, "standard" definitions accompanying most sets of document requests routinely defined "document" to include virtually any type of recorded information. Nevertheless, anecdotal evidence, at worst, suggests that many practitioners remain ill-prepared to delve very deeply into the world of cyber-documents, and the courts have been even less well-equipped to fairly resolve discovery battles over what "documents" *might* exist in electronic form.

On May 29, 2003, however, the Mississippi Supreme Court attempted to bring some clarity to the haphazard process by which e-discovery had heretofore been conducted in the state courts, by amending Miss. R. Civ. P. 26 to engraft a specific provision tailored to the discovery of electronic data. Significantly, the court's chosen means of clarification, new Rule 26(b)(5), acts primarily as a *limitation* upon e-discovery.[2] But just as the court's earlier "limitation" on the scope of discovery of expert opinions, through its adoption of Miss. R. Civ. P. 26(b)(4), set the standard in Mississippi for what is minimally acceptable in the way of expert witness disclosures,[3] in *limiting* e-discovery in the manner that it now has, the Mississippi Supreme Court has attempted to achieve a "middle ground" fairness, by illuminating that which is, or which ought to be, minimally possible in the future conduct of e-discovery.

The new Mississippi Rule 26(b)(5) provides that in order to obtain discovery of electronic data, the requesting party must "*specifically* request production of electronic or magnetic data and specify the form in which the requesting party wants it produced."[4] Presumably, the practice of defining the word "document" in the request for production broadly enough to include electronic and/or magnetic data will no longer suffice to compel production of electronic data; rather, the request itself must specifically describe the electronic data to be produced. The responding party is required to produce the responsive data that is reasonably available to it in the ordinary course of business.

Rule 26(b)(5)'s provision that a responding party need only produce electronic data that is both responsive to a specific request and is "reasonably available to the responding party in the ordinary course of business"

provides an obvious safe harbor to the respondent – but one which is almost certain to engender new disputes that the Mississippi courts will have to resolve. Even the purported limitations of the rule intended to assist Mississippi courts in the 21st century leave room for old-fashioned advocacy. What, precisely, does "reasonably available" mean?[5] And while "in the ordinary course of [the respondent's] business" might appear to be self-explanatory, it is equally clear that the employment of a subjective standard will also likely result in a case-by-case, fact-intensive inquiry before any definitive guidelines emerge from the Mississippi courts.[6] Rule 26(b)(5) further provides that "[i]f the responding party cannot – *through reasonable efforts* – retrieve [the requested] data [. . .] or produce it in the form requested," the respondent is obliged to "state an objection *complying with these rules*."[7]

Finally, the new rule incorporates an explicit cost-shifting mechanism in its last sentence. Upon granting a motion to compel production of e-discovery materials, Mississippi courts are empowered – but not required – to "order that the requesting party pay the *reasonable* expenses of any *extraordinary* steps required to retrieve and produce the information."[8] The Comment to Rule 26(b)(5) makes clear that the award of reasonable retrieval costs is in *addition* to those costs the court may assess under Rule 26(d)(9).[9]

In their parting words on the new rule, the commentators also made it quite clear that the limitations of Rule 26(b)(5) operate to restrict "the production of data compilations which [would otherwise be] subject to production under Rule 34." In other words, a party may not attempt an "end run" around Rule 26(b)(5) by couching an e-discovery request in terms of Rule 34. But just as Rule 34 production requests must now be filtered through the lens of Rule 26(b)(5), the new rule, when read in conjunction with Rule 34, clearly makes practicable a targeted Rule 34 request for inspection of an opposing party's computer files.

While Mississippi's newly-adopted e-discovery rule will not put to rest all the nagging questions about whether an adversary – or client – has in fact produced *everything* it was required to produce in discovery, Miss. R. Civ. P. 26 (b)(5) provides a welcome assist in establishing reasonable guidelines where few previously existed. In waging and responding to e-discovery under the new Mississippi rule, the practitioner would be well-advised to keep these basic points in mind:

> 1. Know the universe of potentially available and responsive data, as well as the various formats in which that data can be readily produced;
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> 2. Be prepared to employ a consultant to assist in crafting and responding to specifically targeted e-discovery and understand that an e-discovery request might trigger a responsive invoice for services rendered; and
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> 3. Understand that unless electronic or magnetic data is *specifically* requested, an "old style" blanket document request will carry with it no corresponding obligation on the part of the responding party to conduct *any* search of its computer files.

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**Footnotes**

[1] For thorough discussions of e-discovery under the traditional discovery approach of Fed. R. Civ. P. 34, *see generally* Carol E. Heckman and Jerauld E. Bridges, *Winning Electronic Discovery Motions*, 4 Sedona Conf. J. 151 (2003); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L. J. 561 (2001); Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B. C. L. Rev. 327 (2000).

[2] Rule 26(b)(1) was also amended to include "electronic or magnetic data" in the list of items generally available through discovery. The text of new Rule 26(b)(5) states:

> *Electronic Data*. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

[3] With fairness as its goal, Rule 26(b)(4) was crafted to prevent "surprise" opinion testimony from coming out only at trial and to prevent a party from using discovery obtained through an opponent's expert to prepare her own case for trial. *See* 1 Jeffrey Jackson, Mississippi Civil Procedure § 8:1 (3rd ed. 2002). Thus, the rule makes certain limited expert discovery fair game, while placing expert depositions beyond the scope of permissible discovery absent court order. *See* Miss. R. Civ. P. 26(b)(4).

[4] Miss. R. Civ. P. 26(b)(5) (emphasis added).

[5] Commentators suggest that e-discovery has been, and will continue to be, viewed interchangeably with traditional discovery methods. *See* Redish, *supra* note 1, at 572-574. At best, one can expect that e-discovery disputes will be treated in a manner consistent with "ordinary" discovery challenges in which practitioners oppose requests. Due to the past experience of bench and bar

(or perhaps lack thereof in the realm of cyberspace), it is reasonable to anticipate *ad hoc* determinations without more concrete guidance from Mississippi rules or opinions. By way of illustration, the phrase "reasonably available" appears in only one other instance in the Mississippi Rules of Civil Procedure or its official comments, in referencing the information discoverable from a corporate or organizational party through deposition pursuant to MISS. R. CIV. P. 30(b)(6). The phrase does not appear to have been defined with any precision by the state appellate courts.

[6] This phrase may also be treated expansively by Mississippi courts, only in this instance with somewhat more guidance from existing case law. Analogously, Mississippi opinions interpreting MISS. R. EVID. 803(6), which provides a hearsay exception for data compilations kept "in the course of a regularly conducted business activity," have permitted a wide range of evidence to come within the scope of that rule. *See*, *e.g.*, *Mississippi Gaming Comm'n v. Freeman*, 747 So. 2d 231 (Miss. 1999) (employee's written reports); *Wells v. State*, 604 So. 2d 271 (Miss. 1992) (bank deposits, cash register tapes and accounting sheets); *Ormand v. State*, 599 So. 2d 1299 (Miss. 1992) (physician's laboratory results); *Butler v. Pembroke*, 568 So. 2d 296 (Miss. 1990) (daily receipt logs and bookkeeper's summary); *Watson v. State*, 521 So. 2d 1290 (Miss. 1988) (customer complaints).

[7] MISS. R. CIV. P. 26 (b)(5) (emphasis added). In addition to those grounds for objection to discovery found (or implied) elsewhere in the Mississippi Rules of Civil Procedure, *e.g.,* the requested discovery is not reasonably calculated to lead to the discovery of admissible evidence (MISS. R. CIV. P. 26 (b)(1)); the requested discovery seeks material protected from disclosure by the work-product doctrine (MISS. R. CIV. P. 26(b)(3)); or compliance with a particular discovery request would be unduly burdensome, oppressive or expensive (MISS. R. CIV. P. 26(d)(9)), Rule 26(b)(5) itself suggests as viable grounds for objection the fact that the information sought:

> (a) is not reasonably available in the ordinary course of respondent's business;
> (b) cannot be retrieved through reasonable efforts; or
> (c) cannot, through reasonable effort, be produced in the form requested.

[8] *Id.* (emphasis added). Of course, the utilization of such cost-shifting measures in discovery are not new, although the express inclusion of such a mechanism in the text of the rule is unusual and should serve as a red flag to overzealous counsel to take care in what they request, as they may not only get what they asked for, but have to pay for it as well. *Cf.* MISS. R. CIV P. 26 (d)(9) (on motion for protective order, authorizing court to require payment of expenses attendant to discovery by requesting party). *See also* Redish, *supra* note 1, at 608-19.

[9] *See* MISS. R. CIV. P. 26 cmt.