North Carolina Adopts Rules To Govern Electronic Discovery

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On October 1, 2011, new procedural rules recently adopted by the North Carolina General Assembly will take effect and, for the first time, address electronic discovery in a systematic and uniform manner in the state courts. These amendments to the North Carolina Rules of Civil Procedure primarily provide practitioners with the procedural tools necessary to manage electronic discovery, but also significantly increase the ability of litigants to obtain court-ordered limits on the discovery process. The amendments are numerous and, in some instances, technically nuanced. However, the following list represents the ten most significant changes that parties and practitioners will confront when the rules take effect later this year.

1. *Electronically-stored information ("ESI") is discoverable.* Under amended Rule 26(b)(1), ESI is a category of information generally subject to discovery in state court litigation.

2. *Certain metadata is discoverable*. Amended Rule 26(b)(1) extends the definition of ESI to include reasonably accessible metadata that will allow the receiving party to discern "such information as the date sent, date received, author, and recipients." Other categories of metadata are discoverable upon a showing of good cause.

3. *Inaccessible ESI is generally not discoverable.* Amendments to Rules 26(b)(3) and 34(c) clarify that, absent a showing of good cause, a party is only obligated to produce ESI that is "reasonably accessible."

4. *Courts can shift the costs of discovery of ESI.* Amended Rule 26(b)(3) gives courts the express authority to allocate the cost of electronic discovery between parties, even in the absence of a motion to compel or for entry of a

protective order.

5. *Privilege logs are required as a matter of course.* Amended Rule 26(b)(7) requires parties to produce privilege logs detailing any claim of privilege or work-product protection.

6. *Inadvertent production of privileged materials does not waive privilege.* Under amended Rule 26(b)(7), the inadvertent production of privileged material, including documents subject to work-product protection, does not waive any applicable privilege. Rather, the new rule creates a process that allows a party to either recover such material or, at the very least, ensure its sequestration pending review of the privilege claim by a court.

7. *Parties can control entry of a discovery scheduling order.* Amended Rules 16 and 26(f) create a new "meet and confer" process that requires courts to enter a discovery scheduling order to set parameters and limits on discovery when requested by a party.

8. *Parties must cooperate on developing discovery plans.* The new "meet and confer" process requires parties to work cooperatively in developing a proposed plan to govern the discovery process.

9. *Parties must preserve ESI.* Although the issue of preservation is not addressed directly in the new rules, amended Rule 37(c) creates a safe-harbor from sanctions for any loss of ESI caused by the routine and good-faith operation of a data management system. By implication, this provision suggests that the loss of ESI under other circumstances is potentially sanctionable and, therefore, that parties have an obligation to preserve discoverable ESI.

10. *Subpoena responses must include ESI.* Under amended Rule 45, any party who receives a subpoena for information, data, or documents must include reasonably accessible ESI in its response. Although the existing protections in Rule 45 remain in place and, thus, extend to a subpoena request that covers ESI, no special provision or exception is made for a subpoena served on a third party who is not involved in the litigation.

The new North Carolina rules are largely patterned on the 2006 electronic discovery amendments to the Federal Rules of Civil Procedure, and, as a result, the practices and procedures that have developed in the federal courts in recent years will provide a substantial amount of guidance on compliance with the state amendments. Although the North Carolina courts are unlikely to follow an *identical* course as the federal courts in interpreting and applying these rules, the existing body of case law and practice norms are likely to carry over to a significant degree.

Based on our experience with both the federal rules and similar state rules, once the amendments take effect, companies doing business in North Carolina will experience an increased need to implement appropriate information governance policies and procedures that will allow them quickly and efficiently to (a) identify the need for a litigation hold, (b) identify the data that need to be preserved, (c) identify the custodians of that data; (d) prevent any automatic loss or destruction of the data; and (e) maintain and monitor compliance with the litigation hold. Further, in order to manage electronic discovery in as cost-effective a manner as possible, companies will want to develop familiarity and experience, either through in-house or outside counsel, in creating and negotiating targeted discovery plans that address issues such as preservation orders, protective orders and clawback provisions, each of which can significantly limit the cost and burden of electronic discovery.

The Williams Mullen E-Discovery and Information Governance Section will continue to monitor these electronic discovery rules once they take effect and will issue updates on any noteworthy developments as they occur.

For more information about this topic, please contact the author or any member of the Williams Mullen e-Discovery and Information Governance Team.

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