



## Significant New Electronic Discovery Legislation in North Carolina Likely To Become Law

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The North Carolina General Assembly has taken a decisive step towards addressing the issue of electronic discovery in the state courts. Recently, the North Carolina House of Representatives passed House Bill 380 ("HB 380") that would amend various provisions of the North Carolina Rules of Civil Procedure to explicitly incorporate electronically stored information ("ESI") into the discovery process. HB380 now goes to the Senate for consideration.

Although the House made several minor changes to the language originally proposed in several sections of HB380, none of the revisions would significantly change the scope or effect of the rules proposed in the original version of the bill. The fact that HB380 left the House in largely the same form that it had entered provides a clear indication that the legislation is unlikely to face any significant roadblocks before final passage by the Senate. Indeed, the bill did not receive a single "no" vote in the House. As a result, HB380 is expected to pass by the end of the current legislative session and go into effect on October 1, 2011. As currently written, the rule changes would apply only to litigation filed on or after that date.

The version of HB380 currently under consideration by the Senate is largely identical to the version originally introduced and, if passed in its present form, would:

- add ESI as a category of discoverable information under Rule 26(b)(1);
- extend the definition of ESI in Rule 26(b)(1) to include certain categories of metadata, an area which is not directly addressed by the FRCP, and could have a significant impact on the preservation and production of metadata by North Carolina litigants;
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protect privileged information that is inadvertently disclosed during discovery under Rule 26(b)(7);

- create a new procedure for conducting pre-trial discovery planning conferences to discuss e-discovery issues under Rule 26(f);
- expand a litigant's ability to obtain a court-ordered discovery plan to control the scope and boundaries of electronic discovery under Rule 26(f);
- allow a party, under certain circumstances, to withhold discoverable ESI that is not reasonably accessible under Rule 34(b); and
- protect parties from discovery sanctions when ESI is deleted pursuant to a routine information management system under Rule 37(c).

HB 380 will have a significant impact on how parties conduct discovery in North Carolina State Courts. Based on our experience with similar rules in both the federal courts and other state courts, entities affected by these rule changes will experience an increasing need to implement appropriate information governance policies and procedures, including mechanisms for properly identifying and responding to circumstances that trigger a duty to preserve potentially relevant evidence. Entities affected by these rule changes will find it invaluable to develop policies and procedures that appropriately identify sources of relevant evidence, electronic or otherwise, and to issue, maintain and monitor litigation holds. In addition, entities affected by these rule changes will want to develop an expertise, whether through in-house or outside counsel, in working with the new Rules to create and negotiate targeted, iterative, and proportional discovery plans, including preservation orders, protective orders and clawback provisions, which can significantly decrease the cost and burden of electronic discovery.

The Williams Mullen E-Discovery and Information Governance Section will continue to monitor HB380 as it proceeds through the Senate and will issue updates on any significant developments.

*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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