



## Electronic Discovery Legislation Introduced in North Carolina

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On March 16, 2011, legislation was introduced in the North Carolina General Assembly to address the issue of electronic discovery in state court litigation. If passed into law, House Bill 380 ("HB380") would, for the first time, explicitly make electronically-stored information subject to discovery in all North Carolina state court proceedings. The legislation is generally designed to modernize the North Carolina Rules of Civil Procedure and accommodate the realities of discovery in an era when the vast majority of documents relevant in any given lawsuit are created and/or stored electronically. For example, the proposed legislation would:

- add electronically-stored information ("ESI") as a category of discoverable information under Rule 26(b)(1);
- 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).

These and the other proposed amendments largely mirror the e-discovery provisions of the Federal Rules of Civil Procedure and, for many practitioners, will simply align the procedural rules with current practice norms. The legislation, however, does contain two noteworthy departures.

HB380 proposes a significant new rule regarding the discoverability of metadata. The proposed amendment to Rule 26(b)(1) would make certain types of electronic metadata presumptively subject to discovery by defining "discoverable information" to include "reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients." If passed, this provision would require litigants to produce the specified types of metadata for all ESI as a matter of course, so long as such metadata were reasonably accessible. This provision marks a significant departure from current procedural norms and would require companies to be more proactive in their management of metadata, but would promote the availability of information that in many instances can significantly impact the direction of litigation.

HB380 also proposes a wholesale amendment to Rule 26(f) that would expand the ability of a litigant to get the court directly involved in the management of discovery in general and e-discovery in particular. The lack of defined limitations on the length of the discovery period and scope of permissible discovery in state-court litigation in North Carolina has long vexed both practitioners and litigants. Although HB380 does not fundamentally alter this procedural paradigm, the proposed revision of Rule 26(f) would allow a litigant, acting unilaterally, to request that the parties conduct a conference to discuss a discovery plan and e-discovery issues. Once such a request is made, the parties would be required to meet and confer regarding various discovery issues and would also be required to submit either joint or competing discovery plans to the court for approval. The proposed rule would then require the court to enter a discovery plan upon the motion of either party. These revisions would largely eliminate the discretion that courts currently have on whether to enter scheduling orders/discovery plans and would expand the ability of parties to obtain defined limits on the discovery process.

Although the final form of HB380, as well as its prospects for passage, are currently uncertain, introduction of the legislation clearly indicates that e-discovery will become a feature of state-court litigation in North Carolina in the near future. In anticipation of the coming rule changes, companies doing business in North Carolina would be well advised to review their information governance policies and procedures to ensure that they are managing their ESI, particularly their metadata, in as efficient and advantageous a manner as possible.

The Williams Mullen E-Discovery and Information Governance Practice Group will closely monitor HB380 as it proceeds through the General Assembly and will issue periodic alerts on any significant developments with the legislation. If you are interested in being added to our mailing list for these alerts, please send an email to [bvick@williamsmullen.com](mailto:bvick@williamsmullen.com) with the subject "HB380 Mailing List."

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

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