Coates' Canons Blog: E-Discovery in North Carolina Courts: An Overview of Recent Amendments to the North Carolina Rules of Civil Procedure

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As noted in a previous **post**, the General Assembly recently enacted **S.L. 2011-199 (HB 380)**, which, effective October 1, 2011, amends the North Carolina Rules of Civil Procedure (NCRCP) to address issues related to e-discovery in North Carolina state courts. (For the unversed, discovery is the pre-trial phase in a lawsuit in which each party can obtain evidence from the opposing party (and sometimes by non-parties) through various means including requests for answers to interrogatories, requests for production of documents, requests for admissions, and depositions. And, e-discovery is the discovery of information that is stored electronically.)

This post summarizes the major changes to the NCRCP as they relate to e-discovery in North Carolina state courts and compares them with similar provisions in the Federal Rules of Civil Procedure (FRCP), which apply in federal courts.

Generally, a party to litigation in both federal and state courts is required to produce, on request, all documents and tangible things that are within a party's possession, custody, or control and that are relevant to the dispute. The scope of what must be produced differs slightly in federal court proceedings than in state court proceedings, but in both court systems the scope is very broad. How, though, do the discovery requirements apply to electronic information?

Litigants and courts have struggled to answer this question for several years now. In 2006, The United States Supreme Court promulgated amendments to the Federal Rules of Civil Procedure, which were subsequently approved by the United States Congress, to specifically address the discovery of electronic information in federal courts (2006 FRCP amendments). The 2006 FRCP amendments explicitly authorized the discovery of electronically stored information (ESI). The 2006 FRCP amendments also refined the rules to hone in on the unique issues posed by e-discovery and to alert litigants and courts to the need to address these issues. For a detailed discussion of the 2006 FRCP amendments, click **here**.

As stated above, the General Assembly recently amended the NCRCP to address issues related to e-discovery in North Carolina state courts (2011 NCRCP amendments). The 2011 NCRCP amendments largely parallel the 2006 FRCP amendments, but there are a couple of potentially significant differences. The following categorizes the 2011 NCRCP amendments into six broad topic areas and discusses if (and how) they differ from the FRCP. (Note that **S.L. 2011-199 (HB 380)** directs the Revisor of Statutes to print as annotations to G.S. 1A-1, "all explanatory comments of the drafters of this act, the North Carolina Bar Association Litigation Section E-Discovery Committee, as the Revisor may deem appropriate." Once published, the explanatory comments may provide additional guidance as to how to interpret the new requirements.)

Definition of Electronically Stored Information

New NCRCP 26 explicitly lists "electronically stored information" as among the types of information that are subject to discovery in civil litigation. The same term is used in the FRCP, but it is defined slightly differently. Under the FRCP, ESI is defined to include "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained. . . ." *See* FRCP 26. New NCRCP 26 does not define ESI, except to state that

> the phrase 'electronically stored information' includes 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. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata.

This is a potentially significant difference between the federal and North Carolina rules. The discovery of metadata is not specifically addressed by the FRCP and federal courts have struggled as to when, and under what circumstances, metadata must be produced. With the amended definition of ESI in NCRCP 26, the General Assembly attempted to provide litigants in North Carolina courts some guidance on this issue but, as detailed in a previous **post**, questions remain as to the scope of this requirement.

Form of Production of Electronically Stored Information

New NCRCP 34 authorizes a party requesting discovery to specify a particular form or forms for the production of ESI. If the producing party objects to the requested form or forms, it must state its objection in writing and indicate the form or forms it intends to use. Absent agreement among the parties or court order, the ESI must be produced "in a reasonably usable form or forms." ESI, however, need not be produced in more than one form.

This process is very similar to that authorized under the federal rules. The only difference is that FRCP 34 requires that ESI be produced in the form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. The commentary to FRCP 34 specifies that "[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." It is unclear if the General Assembly intends that the same directive apply to NCRCP 34.

Limitations on Discoverability of Electronically Stored Information

Also, under new NCRCP 34, the producing party may object to the production of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. This limitation is almost identical to that imposed under the FRCP. The producing party may file for a protective order, but it bears the burden of showing that the ESI sought is not reasonably accessible. Even if the producing party meets this burden, the court may order production if the requesting party shows good cause. (Before ruling, the court must consider the proportionality factors set forth in NCRCP 26(b)(2).) Likewise, if the producing party refuses to produce ESI in the requested form, or because it claims that it is not reasonably accessible, the requesting party may file for an order under NCRCP 37 to compel production of the ESI. The movant must certify that it has first attempted in good faith to work out any issues with the producing party. Again, these processes are very similar to those authorized under the FRCP. Note, however, unlike under the federal rules, NCRCP 37 specifies that if the motion is granted the court must order the moving party to pay the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the opposition to the motion was substantially justified. And, if the motion is denied, the court must order the moving party to pay to the opposing party the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the motion was substantially justified.

Safe Harbor Against Spoliation Sanctions

The NCRCP authorize judges to impose sanctions on a party for failure to comply with a court order, including an order to compel production of ESI. New NCRCP 37(c) imposes a limitation on this otherwise broad authority. It provides that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of routine, good-faith operation of an electronic information system." This limitation exactly mirrors that imposed under FRCP 37(e). At least in the federal courts, the so-called safe harbor provision has been very narrow in its application. In fact, the committee notes to FRCP 37 state that it only applies to information lost "due to the 'routine operation of an electronic information system'—the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs." Good faith operation of an information system likely obligates a party to act affirmatively to prevent its information system from destroying or altering information.

Discovery Plans

One of the biggest changes to the NCRCP is the creation of a comprehensive pre-trial discovery plan process. The purpose of the process is to encourage parties to work together early in the litigation to identify and address common

discovery issues, including issues related to ESI. In fact, one of the most effective mechanisms to control discovery costs and limit disputes is for the parties to mutually develop a discovery plan early in the litigation process.

With respect to litigation in federal courts, FRCP 26(f) requires parties to participate in a “meet and confer” and to contribute in good faith in the formation of a discovery plan. New NCRCP 26(f) does not require all litigants in state court actions to participate in a pre-trial discovery meeting or to create a discovery plan, but it allows either party’s attorney, or an unrepresented party, to request a discovery meeting no earlier than forty days after the complaint is filed. If a discovery meeting is requested, the parties must meet within twenty-one days after the request is filed in the county in which the action is pending. A court also may direct the parties to appear before it for a discovery conference any time after the commencement of the litigation.

During the discovery meeting the attorneys (and unrepresented parties) are directed to discuss the nature and basis of any claims and defenses and the possibilities for prompt settlement or resolution of the case. The attorneys (and unrepresented parties) also must be prepared to discuss a discovery plan and to work together in good faith to formulate the plan.

With respect to ESI, the discovery plan must address issues relating to the preservation of the information and the media, form, format, and procedures by which it will be produced. It also must address, if appropriate, the allocation of discovery costs for preservation, restoration, and production of the ESI and the method for asserting or preserving claims of privilege. Finally, it should detail any limitations proposed to be placed on the discovery of ESI, including, again if appropriate, that discovery be conducted in phases or be focused on particular issues. The discovery plan requirements regarding ESI are more detailed than under FRCP 26(f), although both rules leave it to the discretion of the parties and their attorneys to determine the appropriate issues to address given the context of the litigation and the potential types of ESI that may be involved.

If the attorneys (and unrepresented parties) agree on a discovery plan, they must submit it to the court within fourteen days after the discovery meeting. The parties may request a conference with the court regarding the plan.

If they do not agree on a discovery plan, the parties must submit a joint report to the court describing the parts of the plan they agree upon and stating each party’s position on the issues about which they disagree. Upon motion of either party, the parties may appear before the court for a discovery conference at which the court must order the entry of a discovery plan. The order may address the issues raised by the parties and any other issues necessary for the proper management of discovery in the litigation.

Privileged ESI

The discovery of electronic information further complicates an already burdensome process for litigants—the review of documents for privileged information. Mirroring FRCP 26(b)(5), new NCRCP 26(b)(7) authorizes a party that inadvertently produces privileged information to assert the privilege claim after the information is produced. The receiving party must then return, sequester, or destroy the information and must not disclose it until the claim is resolved. The receiving party also must take reasonable steps to retrieve the information if it has already been disclosed.

Parties also may adopt their own process for dealing with disclosures of privileged information in their discovery plan. *See* NCRCP 26(f); *cf.* Morris v. Scenera Research, LLC, 2011 WL 3808544 (N.C. Super. Aug. 26, 2011) (finding no waiver of privilege when party followed process that parties jointly agreed to with respect to the recovery of inadvertently disclosed privileged information). However, if parties adopt protocols to address inadvertently disclosed privileged materials, the agreements may provide protection only as between the parties to the agreement and may apply only in the current litigation. An agreement between two or more parties in litigation does not necessarily estop a third party, in a subsequent litigation, from arguing that a waiver has occurred by disclosure of the privileged information in the previous matter. To address this issue and provide greater assurance to litigants in federal courts, Congress amended the Federal Rules of Evidence (FRE) in 2008 to, among other things, provide that in the event of an inadvertent disclosure of privileged material, no waiver occurs if the privilege-holder took “reasonable steps” both to “prevent disclosure” in the first instance and “to rectify the error” in a timely manner. *See* FRE 502. It also purposes to limit subject-matter waivers for all disclosed privileged materials (even intentional disclosures), except under certain circumstances. To date, there is no counterpart to FRE 502 in the North Carolina Rules of Evidence.

Links

- canons.sog.unc.edu/?p=5432
- www.ncleg.net/Sessions/2011/Bills/House/PDF/H380v4.pdf
- sogpubs.unc.edu/electronicversions/pdfs/ediscovery09.pdf