E-DISCOVERY IN NORTH CAROLINA: A REVIEW OF THE 2006 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE 2008 PROPOSED AMENDMENTS TO THE NORTH CAROLINA RULES OF CIVIL PROCEDURE

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INTRODUCTION

Electronic discovery is a hot topic in litigation today. Although the "digital age" has been upon us for many years, the legal system continues to struggle to keep up with the fundamental transformation it has caused in the way people communicate and store information. Computers are constant fixtures in our daily lives, and with the migration from desktops to mobile platforms, the ability to "stay connected" is virtually limitless. The natural result of the ability to produce data anywhere, anytime is an exponential proliferation of actual data produced. Not only are electronic documents easily produced and replicated; they are very difficult to destroy. A discarded or shredded paper document is, for all intents and purposes, irretrievable. But, when a digital file is deleted, the computer merely removes the visible pointer to the electronic data — it does not actually delete the data itself. Only when the space formerly occupied by a "deleted" document is reused, is the document truly erased. In the interim, the document remains on the computer hard drive, and multiple copies and iterations may exist elsewhere, such as on an entity's computer network, CDs, DVDs, external drives, laptops, personal digital assistants (PDAs), MP3 players, and within an entity's archival or back-up systems. The capacity to store all this data is virtually limitless further facilitating the data propagation. Whereas a few thousand pages of paper documents fill a standard filing cabinet drawer, millions of printed pages can occupy a single computer tape or disk drive. Organizations easily can accumulate stacks of disks and tapes filled with countless documents as they transition to a "paperless environment," thus increasing the volume of information within their possession, custody or control. This vast accumulation of data might someday prove beneficial in the unlikely event of a system meltdown, and may even be mandated by law, but it all too often poses a financial and logistical nightmare for an organization involved in even the most basic litigation.

During the early part of this decade, federal and state courts across the country began to tackle in earnest the unique, and often complex, issues presented by the preservation and production of electronic information by parties to litigation. Although the methodologies applied to address these issues, and the resulting outcomes, varied widely across jurisdictions, general census quickly arose around the need for more guidance. In response, the United States Supreme Court promulgated amendments to the Federal Rules of Civil Procedure in 2006, subsequently approved by the United States Congress, to specifically address the discovery of electronic

information (2006 amendments).[1] Several state courts followed suit—most adopting amendments that largely mirror the federal rules.[2] And, even in states where the rules have not been amended to directly focus on issues relating to electronic discovery, most courts have interpreted their existing civil procedure rules to authorize the discovery of electronic information.

North Carolina state courts fall into this latter category. To date, the General Assembly has not amended the North Carolina Rules of Civil Procedure to specifically address electronic discovery.[3] Instead, North Carolina state courts have relied on interpretations of the existing rules governing the discovery of documents, supplemented by outside resources such as the Conference of Chief Justices' Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information, to address disputes over the discovery of electronic information.[4] Recently, the Electronic Discovery Study Committee of the North Carolina Bar Association, headed by former Chief Justice Rhoda Billings, proposed electronic discovery-related amendments to the North Carolina Rules of Civil Procedure (proposed NC

[1] A copy of the amendments is available at http://www.supremecourtus.gov/orders/courtorders/frcv06p.pdf (last visited March 9, 2009). Congress amended the Federal Rules of Evidence in 2008 to address issues relating to the waiver of attorney-client privilege and work product doctrine. For a copy of the amendments and congressional history, see http://federalevidence.com/blog/2008/september/president-signs-new-attorney-client-privilege-rule-fre-502 (last visited March 9, 2009).

[2] For a list of current states that have amended their state court rules of civil procedure to address electronic discovery issues, see http://www.ediscoverylaw.com/2008/10/articles/resources/current-listing-of-states-that-have-enacted-ediscovery-rules/ (last visited March 9, 2009).

[3] Note, however, that the North Carolina Business Court has amended its local rules to include directives to counsel to, at the initial Case Management Meeting, discuss certain topics related to the discovery of electronic information, including the volume of electronic information likely to be subject to discovery, the form of production (*i.e.* native format or paper), the need for retention of electronic documents and backup tapes, the need for cost-shifting with regard to the production of electronic data, and the need for security measures to protect electronic data. The rules are available at http://www.ncbusinesscourt.net/New /localrules/ (last visited March 1, 2009).

[4] *See, e.g.,* Analog Devices, Inc. v. Michalski, 2006 WL 3287382 (N.C. Super. Nov. 1, 2006) (analyzing claim that production of electronic information poses undue burden on party under Rule26(b)(2) proportionality factors); Bank of America v. SR International Business Insurance Co., Ltd, 2006 WL 3093174 (N.C. Super. Nov. 1, 2006) (denying electronic discovery request on non-party as unduly burdensome after considering, among other things, the factors set forth in the Conference of Chief Justices, Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information). The Conference of Chief Justices, Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information is available at http://www.ncsconline.org/images/EDiscCCJ GuidelinesFinal.pdf (last visited March 1, 2009).

amendments).[5] The amendments largely track the 2006 amendments to the federal rules, but differ in a few key respects.

This publication briefly discusses the application of the federal rules, as amended in 2006, and the proposed NC amendments to the discovery of electronic information in North Carolina federal and state courts, respectively. The discussion centers on what electronic information is discoverable, common issues related to its production, the role of parties and counsel in the discovery process, and issues relating to the inadvertent production of privileged electronic information. Where applicable, it highlights the differences between the 2006 federal amendments and the proposed NC amendments.

WHAT ELECTRONIC INFORMATION IS DISCOVERABLE?

FEDERAL RULES OF CIVIL PROCEDURE

Before adoption of the 2006 amendments, Federal Rule of Civil Procedure (FRCP) 34, which authorizes the production of documents, defined document to include *compilations of data*. Federal courts interpreted this provision to authorize the discovery of digital information.[6] There was some concern among both litigators and academics that data compilations did not encompass all electronically generated information, including information generated through automatic computer processes without any human interaction.[7] In response, the 2006 amendments authorized the discovery of *electronically stored information* (ESI). 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 . . . ." According to the committee note to FRCP 34, the definition of ESI is "intended to be broad enough to cover all current types of computer-based information, and flexible enough to

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[5] The proposed amendments are available at http://www.ncbar.org/download/litigation/eCommittee.pdf (last visited March 1, 2009). The Electronic Discovery Committee has invited comments on the proposed amendments. *See The Litigator*, NC Bar Association, Vol. 29, No. 1 (Sept. 2008), *available at* http://litigation.ncbar.org/Newsletters/Newsletters/Downloads_GetFile.aspx?id=6996 (last visited March 1, 2009).

[6] *See, e.g.*, Linnen v. A.H. Robbins Co 1999 WL 462015 (Mass. Super. June 16, 1999) ("While the reality of [electronic discovery] may require a different approach and more sophisticated equipment than a photocopier, there is nothing about the technological aspects involved which renders documents stored in an electronic media 'undiscoverable.'").

[7] *See The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed. June 207), *available at* http://www.thesedonaconference.org/publications_html (last visited Feb. 21, 2009).

encompass future changes and developments." This definition allows discovery obligations to adjust to new technologies and, at least in theory, prevents litigants from evading discovery obligations because the definition of document does not keep pace with the technological changes.

Are there any limits to what constitutes ESI for purposes of meeting discovery obligations? To date there are few cases that test the boundaries of discoverable ESI. Of the few courts to address this issue, however, most have found no duty to preserve or produce "ephemeral ESI."[8] Ephemeral ESI is data that is not "stored for any length of time beyond [its] operational use and . . . [that is] susceptible to being overwritten at any point during the routine operation of the information system."[9] Although ephemeral ESI can take many forms, common types include cache files,[10] instant messaging communications, and random access memory (RAM).[11]

At least one court has reached the opposite conclusion regarding the discovery of ephemeral ESI. In *Columbia Pictures, Inc. v. Bunnell*,[12] a federal district court in California held that data stored in Random Access Memory (RAM), however temporarily, is electronically stored information subject to discovery under Rule 34. Although the facts giving rise to the case are fairly unique—the case involved a claim against defendants for knowingly enabling, encouraging, inducing, and profiting from massive online piracy of the plaintiffs' copyrighted works through the operation of their websites—the conclusion that information stored only in RAM may be discoverable in at

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[8] See, e.g., Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey, 497 F. Supp. 2d 627 (E.D. Pa. 2007) (rejecting sanctions on defendant for failure to preserve temporary cache files of archived web pages accessed through a third-party, public website); Malletier v. Dooney & Bourke, Inc., 2006 WL 3851151 (S.D.N.Y. Dec. 22, 2006) (rejecting sanctions for failure to preserve purportedly relevant chat room conversations with customers on its website where the defendant did not have a means to preserve the transitory online discussions and it was unlikely the conversations would have provided relevant evidence); Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162 (S.D.N.Y. 2004) (rejecting sanctions for defendant's failure to preserve data readings on an electronic device used to tune computer hard drives, where the data collected from the device were routinely written-over when the next5 measurement was taken).

[9] Kenneth J. Withers, "*Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 366 (2008).

[10] Each time a Web page is accessed, the computer creates a cache file (a temporary copy) of page's text and graphics. If the Web page is opened again, the Web browser checks the Web site server for changes to the page. If the page has changed, the browser retrieves a new version over the network. If the page has not changed, the browser uses the cache files from the computer's random access memory (RAM) or hard drive to display the page. A cache file, thus, facilitates retrieval of previously viewed Web pages.

[11] RAM is a computer's "temporary" memory in which information is stored while it's in use, rather than on the hard drive, enabling software to operate faster. The contents of RAM may change as frequently as by the second.

[12] 245 F.R.D. 443 (C.D. Cal. 2007).

least some circumstances could lead to tricky preservation decisions by litigants or potential litigants.[13] This area of law is still developing, but, at the very least, the *Bunnell* decision underscores the importance of parties agreeing to preservation, search, and retrieval protocols for electronic information early in the litigation process (discussed further below).

PROPOSED NC AMENDMENTS

The current North Carolina Rule of Civil Procedure (NCRCP) 34 defines document to include *data compilations*. North Carolina courts have interpreted this term, at least implicitly, to include electronic information.[14] The proposed NC amendments modify the definition of document in Rules 26 and 34 to include ESI. Unlike the 2006 amendments to the federal rules, with one exception,[15] the proposed NC amendments do not further define or provide examples of ESI.

PRODUCTION OF ESI

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 26 requires initial disclosure, without awaiting a discovery request, of a copy of or a description by category and location of all ESI in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses. Additionally, Rules 26

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[13] At least one court has rejected the underlying premise of the *Bunnell* decision, that information on RAM is in fact "stored." *See* O'Brien v. O'Brien, 899 So.2d 1133 (Fla. App. 2005). Recall that the committee notes to Rule 34 "clarify[y] that Rule 34 applies to information that is fixed in a tangible form and to information that is *stored* in a medium from which it can be retrieved and examined." For a good discussion of the issues relating to ephemeral data and the potential discovery obligations see Kenneth J. Withers, "*Ephemeral Data" and the Duty to Preserve Discoverable Electronically Stored Information*, 37 U. BALT. L. REV. 349, 366 (2008).

[14] *See, e.g.*, Arndt v. First Union Nat'l Bank, 613 S.E.2d 274 (N.C. App. 2005) (holding that trial court did not error in giving spoliation instruction where defendant failed to preserve certain e-mails and profit and loss statements); Commissioner v. Ward, 580 S.E.2d 432 (N.C. App. 2003) (affirming trial court's sanctions of party that refused to comply with multiple consent orders involving the examining, inspection, and copying of certain electronic information); Analog Devices Inc. v. Michalski, 2006 WL 3287382 (N.C. Super. Nov. 1, 2006) (applying Rule 26 factors to analyze a claim that producing the requested electronic information posed an undue burden or cost and ordering production of the information because of the significant potential for discovery of probative evidence); Bank of Amer. Corp. v. SR Int'l Bus. Ins. Co., 2006 WL 3093174 (N.C. Super. Nov. 1, 2006) (applying Rule 26 factors to analyze a claim by a non-party that producing the requested electronic information posed an undue burden or cost and holding that the non-party need not produce the information because the low marginal utility did not justify imposing a heavy burden on a non-party).

[15] The proposed NC amendments explicitly exclude metadata from the definition of ESI. *See, infra,* discussion of form of production.

and 34 authorize a party to request from another party the production of all ESI that is relevant to the claims or defenses of any party and that is within the possession, custody or control of the producing party.

Generally, a party is under a duty to make reasonable and good faith efforts to search and produce potentially relevant ESI that is within its possession, custody or control. This includes data sources within the physical possession or custody of the party, and other sources within the possession or custody of the party's employees and contractors, or other third parties, but still legally, or even practically, within the control of the party.[16] The federal rules do not dictate a specific search protocol for the ESI—what is appropriate and required will depend on the facts and circumstances of each individual case.[17] Parties to a litigation are well advised to agree to a search protocol early in the litigation process to avoid unnecessary (and costly) battles after data has been produced, or even worse, after data that was not produced has been destroyed.

Under FRCP 34, a party is allowed to request to inspect, copy, test, or sample sources of potentially relevant ESI. The ability to test or sample ESI provides parties with an important tool to determine the relevance of particular sources of ESI without incurring significant costs. Parties may agree to a tiered search process—whereby sources of ESI first are tested or sampled and then search requests are refined based on the information (or lack of information) revealed in the test or sample sets. Note, however, that according to the committee notes to Rule 34, the ability to test or sample ESI does not create a routine right of direct access to a party's information system. The party producing the ESI retains the right, at least as an initial matter, to determine the contours of the search process.

FORM OF PRODUCTION

Once relevant ESI is identified by the producing party, how must it be produced? The 2006 amendments do not mandate a specific form for production of ESI. Instead, FRCP 26(f) encourages parties to discuss any issues relating to the form or forms in which it should be produced during the mandatory pre-trial meeting (discussed below). A party may stipulate a specific form or forms for the production of ESI in its written FRCP 34 request.[18] The rule recognizes that different forms may be required for different types of ESI and expressly

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[16] Note that because ESI is easily dispersed, a party may have to search and retrieve information from a variety of sources including desktops, laptops, back-up tapes, portable drives, CDs, DVDs, PDAs, MP3 players, cell phones. Under certain circumstances a party even may have to direct its employees to search their personal (privately owned) computers for relevant information.

[17] *See cf.* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) (sanctioning search and retrieval protocol set forth in the Sedona Conference Best Practices).

[18] The requesting party may specify hard copies of the ESI as the requested form.

authorizes a party to request different information in different forms. If there is no agreement, a party does not need to produce identical ESI in more than one form, though.

The producing party may object to the requested form or forms in its written response to the Rule 34 request. If the producing party objects, or if no form is specified in the Rule 34 request, the responding party must state the form or forms it intends to use in its written response to the document request. The responding party is obliged to produce the ESI in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. If the responding party does not produce the ESI in the form in which it is ordinarily maintained, it may not convert it to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently. For example, according to the committee notes to Rule 34, "[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."

If the requesting party is not satisfied with the form or forms stated by the responding party, FRCP 37(a) requires the parties to attempt to resolve the matter before the requesting party may file a motion to compel production. If a court ultimately must resolve the dispute, it may require the production of ESI in any form, regardless of the form or forms preferred by either party.

METADATA

An issue left unaddressed by the 2006 amendments is whether or not a party is obligated to produce the metadata associated with ESI. Metadata is information describing the history, tracking, or management of an electronic document. It also includes information about the document or file that is recorded by the computer to assist in storing and retrieving the document or file. Examples of metadata include file designation, dates the ESI was created or modified, the author(s) of the ESI, and its edit history. In most instances metadata will have no evidentiary value to the litigation. Who generated a document and when and how it was altered frequently do not relate to the issues in controversy.[19] Metadata, however, often also serves a valuable function in aiding the searchability of the ESI. "For example, system metadata may allow for the quick and efficient sorting of a multitude of files by virtue of the dates of other information captured in metadata. In addition, application metadata may be critical to allow the functioning of routines within the file, such as cell formulae in spreadsheets."[20]

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[19] Note that even if the metadata associated with ESI does relate to the underlying litigation, parties should be cautious because the metadata often is inaccurate. For example, a computer may automatically designate the author of a word processing document based on information stored in the computer.

[20] *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed. June 207), *available at* http://www.thesedonaconference.org/publications_html (last visited Feb. 21, 2009).

Removal of metadata usually requires an affirmative alteration of the ESI—through scrubbing the document or converting the file from its native format. To date, courts have articulated conflicting views over the production of metadata. In *Williams v. Sprint/United Management Co.*,[21] the United States District Court for the District of Kansas held that "[b]ased on [] emerging standards, . . . when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to the production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order." Alternatively, in *Wyeth v. Impax Laboratories, Inc.*,[22] the United States District Court for the District of Delaware held that "[e]merging standards of electronic discovery appear to articulate a general presumption against the production of metadata."[23] The differing views articulated by the courts in these two cases likely stemmed from the different nature of the metadata sought in each case. Significantly, *Williams* involved the production of spreadsheets—where the individual tables may have little meaning without access to the underlying formulas in each cell. As the court stated,

> the more interactive the application, the more important the metadata is to understanding the application's output. At one end of the spectrum is a word processing application where the metadata is usually not critical to understanding the substance of the document. The information can be conveyed without the need for the metadata. At the other end of the spectrum is a database application where the database is a completely undifferentiated mass of tables of data. The metadata is the key to showing the relationships between the data; without such metadata, the tables of data would have little meaning.[24]

And even in *Wyeth*, the court left open the possibility that production of metadata may be required under certain circumstances.

The 2006 amendments do not prescribe a particular form of production and do not specify under what circumstances metadata must be produced. Instead, Rule 26 emphasizes the need of the parties to discuss the form or forms of production, including any issues relating to metadata, and

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[21] 230 F.R.D. 640 (D. Kan. 2005).

[22] 248 F.R.D. 169 (D. Del. 2006).

[23] Note that the court was following the Default Standard for Discovery of Electronic Documents adopted by local rule in that district which directs parties to produce electronic documents as image files if they cannot agree on a different form for production. See Default Standard for Discovery of Electronic Documents, Ad Hoc Committee for Electronic Discovery of the U.S. District Court of the District of Delaware, *available at* http://www.ded.uscourts.gov/Announce/Policies/Policy01.htm (last visited Feb. 9, 2009).

[24] 230 F.R.D. at 647.

resolve any differences without court intervention. In the event that parties do not agree, as stated above, the producing party has the option to produce the ESI either as it is ordinarily maintained or in a form or forms that are reasonably usable. The Sedona Conference Working Group on Electronic Document Retention and Production has published detailed guidance for litigants in interpreting the 2006 amendments and addressing the myriad of issues surrounding the preservation and production of ESI. According to Principle 12 in its 2007 publication, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production,

> Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.[25]

Thus, a party should consider the particular type of ESI and its searchability features when determining whether or not the production of metadata is necessary.[26] Beyond that, absent specific local rules in individual districts, the requirements in any given case will vary based on the needs of the requesting party and types of ESI and metadata involved.[27]

OBJECTIONS TO PRODUCTION

In many ways, electronic information systems make the discovery process easier. A party, for example, may use electronic "key word searches" to cull through thousands of electronic

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[25] *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (2d ed. June 207), *available at* http://www.thesedonaconference.org/publications_html (last visited Feb. 21, 2009).

[26] *See* In re Payment Card Interchange Fee & Merch. Discount, 2007 WL 121426 (E.D.N.Y. Jan. 12, 2007) (stating that defendants had "run afoul of the Advisory Committee's proviso that data ordinarily kept in electronically searchable form should not be produced in a form that removes or significantly degrades this feature" where defendants had stripped text-searchable electronic documents of metadata that would not appear in printed form and then converted them back into text searchable electronic documents without that subset of metadata).

[27] Note that Proposed 2009 Ethics Opinion 1 of the North Carolina State Bar (Jan. 22, 2009) "rules that a lawyer must use reasonable care to prevent the disclosure of confidential client information hidden in metadata when transmitting an electronic communication and a lawyer who receives an electronic communication from another party or another party's lawyer must refrain from searching for and using confidential information found in the metadata embedded in the document." The opinion, however, specifically exempts the disclosure and searching of metadata pursuant to legal obligation, court order or procedure, or the consent of the other lawyer or party. A copy of the proposed ethics opinion is available at http://www.ncbar.gov/ethics/propeth.asp (last visited March 20, 2009).

documents in a matter of minutes. But some sources of ESI can be accessed, searched, retrieved, and produced only at substantial cost and burden to the producing party. The sheer volume of electronically-generated and stored information alone often dwarfs information produced and stored in paper format. Add to that the fact that electronic information often contains dynamic, changeable content, some of which is not readily apparent to the creator or user of the data; electronic information is easily dispersed and often difficult to destroy; and electronic data often exists in platforms that routinely become obsolete—creating legacy data that is hard to retrieve.[28]

In recognition of the unique issues presented by the discovery of ESI and its potentially exorbitant costs, in addition to the limitations imposed on all discovery requests by the proportionality factors of Rule 26(b)(2),[29] the 2006 amendments specify that a party is not obligated to produce ESI that the party identifies as not reasonably accessible because of undue burden or cost.[30] This represents a change from the general presumption of the discoverability of relevant information.[31] The rules do not define what type of ESI is not reasonably accessible. Litigants have focused on the underlying form or format of the information—claiming, for example, that inactive data on backup tapes, legacy data, fragmented or deleted data, and multi-layered databases are not reasonably accessible. Whether or not a particular source of ESI is accessible does not necessarily depend on the type of data or the type of media on which it is

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[28] Judge Tennille noted in a 2006 opinion, "[t]he most salient of the[] differences [between paper documents and electronic information] are that electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic, rather than static; and electronically stored information may be incomprehensible when separated from the system that created it." Analog Devices, Inc. v. Michalski, 2006 WL 3287382, at *5 (N.C. Super. Nov. 1, 2006).

[29] A party may object to any discovery request, including one for ESI, (1) if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) if the party seeking discovery has had ample opportunity through other discovery to obtain the information sought; or (3) if the burden or expense of the proposed discovery outweighs its likely benefit. Pursuant to a motion to compel production, under Rule 37(a) or a motion for a protective order, under Rule 26(c), a court may consider these factors, commonly known as the proportionality factors, to prohibit, limit or condition the discovery on, among other things, the requesting party bearing all or part of the costs of retrieving the information. When engaging in the cost benefit analysis under factor three, a court may consider (a) the needs of the case, (b) the amount in controversy, (c) the parties' resources, (d) the importance of the issues at stake in the litigation, and (e) the importance of the proposed discovery in resolving the issues.

[30] In its response to a Rule 34 request, the producing party should identify by category or type the sources containing potentially responsive ESI that it is not searching or producing.

[31] If a party determines that ESI is not reasonably accessible, it does not relieve the party of its common law duty to preserve the information. A party fails to preserve any potentially relevant ESI at its peril because a court may ultimately order production of that ESI. If the party failed to preserve the ESI it may face sanctions from the court for spoliation.

stored, though. Instead, the determination ultimately depends on whether the costs of retrieving, searching and producing the data outweigh the value of the ESI to the requesting party. Most ESI can be retrieved, it is just a matter of at what cost. ESI is not considered "not reasonably accessible" simply because it is expensive, only if it poses an undue burden or cost on the producing party.

Upon a motion to compel production, or a motion for a protective order, the producing party bears the burden of showing that the ESI is not reasonably accessible because of undue burden or cost. If it meets that burden, there appears to be a presumption against production.[32] The court may, however, order discovery of the ESI if the requesting party demonstrates good cause. In making its determination, the court must take into consideration the Rule 26(b)(2)(C) proportionality factors.[33] The court may order a test or sample production in order to evaluate the likelihood of discovering additional relevant information and weigh its findings against the potential burdens and costs to the producing party.

According to the committee notes to FRCP 26, in most cases discovery from reasonably accessible sources should be sufficient to fully satisfy the requesting party's discovery needs. In fact, parties are encouraged to agree to a phased or tiered discovery approach, wherein the requesting party reviews ESI produced from reasonably accessible sources before requesting further production that may be more difficult to retrieve and, consequently, more costly to the producing party. If the requesting party determines that the initial production is not sufficient, the parties will need to appraise the burdens and costs of looking further as balanced against the potential value of the information sought, and consider both whether to incur those burdens and costs and how best to allocate them among the parties. This is among the issues that should be discussed early on in the litigation.

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[32] According to the chair of the Advisory Committee that drafted the 2006 amendments, however, "the rule is not one of presumed non-discoverability, but instead makes the existing proportionality limit more effective in a novel area in which the rules can helpfully provide better guidance." *See* Committee on Rules of Practice & Procedure, Judicial Conference of the U.S., Meeting of June 15-16 Minutes 25, *available at* http://www.uscourts.gov/rules/Minutes/ST_June_2005.pdf (last visited March 1, 2009).

[33] According to the committee notes to Rule 26, additional appropriate considerations include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessible sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources. For a good discussion of the application of these factors see W.E. Aubuchon Co., Inc. v Benefirst, LLC, 245 F.R.D. 38 (D. Mass. 2007) (holding that ESI was not reasonably accessible but that requesting party had demonstrated good cause for production).

Note that preserving, searching and retrieving ESI from accessible sources also may prove burdensome and costly to the producing party. It often involves some interruption to a party's current operations. Relying on the proportionality factors in Rule 26(b)(2), a party may move for a protective order against producing ESI even from reasonably accessible sources. In practice, however, courts have been less receptive to arguments that producing potentially relevant information from reasonably accessible sources is unduly burdensome. (Recall that data that is reasonably accessible by definition does not pose an undue burden or cost on the producing party.)

PROPOSED NC AMENDMENTS

Currently, NCRCP 26 and 34 authorize a party to request from another party the production of all ESI that is relevant to the subject matter involved in the pending action and that is within the possession, custody or control of the producing party.[34] The scope of discovery is broader than under the federal rules. The proposed NC amendments do not change the scope of discovery but, as stated above, clearly authorize discovery of ESI.

One difference between the federal rules and the proposed NC amendments is that the proposed NC amendments do not allow a party to request to test or sample ESI. It is potentially a significant difference. As stated previously, the ability to test or sample ESI provides an important tool to parties in determining both the potential relevance of particular sources of ESI and the costs involved in its production. Presumably, North Carolina courts could require testing or sampling of the ESI, but a party will not be able to engage in this type of limited discovery on its own initiative.

FORM OF PRODUCTION

Like the 2006 amendments to the federal rules the proposed NC amendments do not specify a form for the production of ESI. Instead, parties are encouraged to agree amongst themselves about what ESI must be preserved and the media, forms, and procedures for production.[35] If the parties do not agree on a specific form, the requesting party may specify the form or forms in which the ESI is to be produced. If the producing party objects to a requested form, it must so state in its written response to the Rule 34 request. It also must state the form or forms in which it intends to provide the ESI. The party must produce the ESI in a reasonably usable form or forms. As under the federal rules, a party need not produce identical ESI in more than one form.

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[34] Neither the current rules, nor the proposed amendments, require early disclosure of information before it is requested by the other party, as do the federal rules.

[35] Note, as discussed below, proposed new NCRCP 26(f) authorizes parties to conduct a discovery meeting and formulate a discovery plan that, among other things, specifies "the media, form, format, or procedures by which [ESI] will be produced . . . ."

If the requesting party is not satisfied with the form stated by the producing party, it may file a motion compelling production under new NCRCP 37. Unlike its federal counterpart, NCRCP 37 does not require the parties to attempt to resolve the matter before the requesting party may file the motion.

METADATA

Another important difference between the federal rules and the proposed NC amendments is that new NCRCP 26 explicitly exempts metadata from the definition of ESI, unless the parties agree otherwise or a court orders otherwise upon motion by a party and a showing of good cause. On its face, excluding metadata from the definition of ESI appears to resolve an issue that the federal courts have struggled with in interpreting FRCP 34. Because metadata often performs an important function in aiding the searchability of ESI, however, failing to produce metadata in some cases may conflict with a party's obligation to produce the ESI in a reasonably usable form or forms. Recall that the committee notes to the federal amendments state that producing in a reasonably usable form means that the producing party should not remove or degrade the electronic search capability of ESI—which means that the producing party may be restrained from stripping ESI of all metadata. If the proposed NC amendments are interpreted in the same way as the identical language in the federal rules has been interpreted, parties may be forced to produce metadata in some circumstances to preserve the searchability of the ESI.

OBJECTIONS TO PRODUCTION

The process by which the producing party may object to the production of ESI is very similar under the proposed NC amendments as under the federal rules. As an initial matter, a party always may seek a protective order under Rule 26(c) if it believes that a discovery request is unreasonably cumulative, is sought for an improper purpose, or poses a burden on the producing party that outweighs its likely benefit to the requesting party.[36]

Additionally, as under the federal rules a party is not obligated to produce ESI from sources that it identifies as not reasonably accessible because of undue burden or cost. The party must state its objection in its written response to the Rule 34 request. The producing party also may seek a protective order under Rule 26(c) or the requesting party may move for an order to compel production under Rule 37(a). The party objecting to the production has the initial burden of demonstrating that the basis for the objection exists. If it meets this burden, the court may nonetheless order discovery if the requesting party shows good cause. In making its determination, the court must consider the Rule 26(b)(2) proportionality factors.

[36] The NCRCP 26(b)(2) proportionality factors are identical to their federal rule counterparts.

PRE-TRIAL CONFERENCES

A recurrent problem identified in electronic discovery cases is that parties do not identify, discuss and resolve issues related to the preservation and production of ESI early in the litigation process. Often a party does not have sufficient knowledge of its own or the other party's information technology systems and the burdens and costs associated with preserving, searching and producing ESI until well into the litigation, after problems arise. The various volume, formatting, readability, and searchability issues surrounding the discovery of electronic information can lead to time-consuming and costly disputes.

Both the 2006 amendments to the federal rules and the proposed amendments to the N.C. rules attempt to address this issue by requiring, or at least strongly encouraging, parties to discuss any issues relating to the discovery of ESI very early in the litigation—through pre-trial conference processes.

FEDERAL RULES OF CIVIL PROCEDURE

With a few exceptions, FRCP 26(f) requires parties to meet at least 21 days before a scheduling conference is held or scheduling order is due under FRCP 16. During the Rule 26(f) conference, commonly known as the "meet and confer," parties must discuss the preservation of ESI and develop a proposed discovery plan that, among other things, details any issues relating to the disclosure or discovery of ESI, including the form(s) in which it will be produced. Rule 26(f) also directs the parties to note any issues relating to claims of privilege, including if the parties agree on a procedure to assert privilege claims in the event of an inadvertent production of privileged information and whether to ask the court to include such an agreement in an order.

FRCP 26(f) encourages transparency and communication in the discovery process, particularly around issues involving ESI. And, increasingly, federal courts are interpreting Rule 26(f) as placing a requirement on parties to cooperate.[37] According to many leading commentators, the 2006 amendments to Rule 26 have impliedly removed the adversarial element from the meet and confer. Consequently, parties should be prepared to discuss the contours of their information systems and identify any potential problems with preserving and producing ESI and the potential costs associated with the search, storage, and retrieval processes.[38]

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[37] *See, e.g.*, Securities and Exchange Commission v. Collins & Aikman Corp., 2009 WL 94311 (S.D.N.Y. Jan. 13, 2009) (noting that courts view the discovery rules "as a mandate for counsel to act cooperatively") (internal quotations omitted).

[38] Note that in order to properly prepare for the Rule 26(f) conference, counsel should consult with information technology (IT) professionals and other employees who may have relevant ESI. Failure to anticipate unique

The federal rules do not govern preservation obligations, but Rule 26(f) expressly requires discussion of preservation issues and possible agreements on post-production claims of privilege or work product protection during the meet and confer. Carefully crafted agreements can dispense with impractical preservation requirements.

Some courts have assumed a more active role in the pre-trial conference process. In *O'Bar v. Lowe's Home Centers, Inc.*,[39] the United States District Court for the Western District of North Carolina set forth detailed guidelines governing the discovery of ESI, including the anticipated scope of requests for, and objections to, the production of ESI, the form or forms for production, whether metadata would be requested for some or all ESI, the scope of preservation obligations relating to ESI, and the identification of ESI that a party identified as not reasonably accessible because of undue burden or costs.[40] According to the court, "[t]he purpose of the guidelines is to the facilitate the just, speedy, and inexpensive conduct of discovery involving ESI in this case, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention."[41] The Court further warned the litigants that "compliance with the guidelines may be considered by [it] in resolving discovery disputes, including whether sanctions should be awarded pursuant to [FRCP] 37."[42] Several courts have modified their local rules to provide detailed guidance to litigants regarding the discovery of ESI.

After the Rule 26(f) meet and confer, parties must submit the proposed discovery plan to the court in advance of the FRCP 16 conference. Rule 16 does not require judges to address issues relating to the discovery of ESI in its scheduling order, but the 2006 amendments added "provisions for disclosure or discovery of electronically stored information" and "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production" to the list of subjects that may be addressed in the order. The rule alerts courts as to the possible need to address ESI-related issues early in the litigation, but leaves the burden on the parties to raise any relevant issues. A court is authorized under Rule 16(f), however, to impose sanctions on a party or its attorney if either is substantially unprepared to

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problems and costs associated with the discovery of ESI early in the process may cause even greater overall costs to a party.

[39] 2007 WL 1299180 (WDNC May, 2, 2007).

[40] The guidelines were adapted from the United States District Court for the District of Maryland's "Suggested Protocol for Discovery of Electronically Stored Information." The document is available at http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (last visited Feb. 27, 2009).

[41] *Id*. at *4.

[42] *Id*. at *4.

participate, or does not participate in good faith, in the Rule 16 conference. Thus, parties should be prepared to discuss any electronic discovery issues that may be raised by the court.

PROPOSED NC AMENDMENTS

Under current Rule 26(f), the court may direct the attorneys for the parties to appear before it for a discovery conference upon motion of either party that includes, among other things, a proposed discovery plan, proposed limitations on discovery, and a statement that the party's attorney has made reasonable efforts to reach agreement with the opposing party's attorney on the issues set forth in the motion.[43] If either party proposes a discovery plan, both parties and their attorneys must participate in good faith in formulating the plan. After the discovery conference, the court enters an order establishing a plan for discovery, including setting a schedule for and identifying any limitations on discovery and, if necessary, allocating discovery expenses between the parties. The order may be amended at any time in the interest of justice.

The proposed amendment to Rule 26(f) significantly modifies the discovery conference process. Under the new rule, either party's attorney, or an unrepresented party, may request a discovery meeting no earlier than forty days after the complaint is filed.[44] The parties must meet within twenty-one days after the request is filed in the county in which the action is pending.[45] The 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.[46] 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

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[43] Note that NCRCP 26(f1) prescribes a different discovery conference procedure in medical malpractice cases.

[44] Note that proposed new NCRCP 26(g) prescribes a different discovery conference procedure in medical malpractice cases.

[45] A court may order the parties to meet earlier in the litigation process. The parties or their attorneys also may mutually agree to schedule the conference at a different time than is prescribed by the rules.

[46] The discovery meeting may be held by telephone, videoconference, in person, or some combination thereof unless the court orders the attorneys and unrepresented parties to attend in person.

should detail any limitations proposed to be placed on the discovery of ESI, including, 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.[47] 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 ESI further complicates an already burdensome process for litigants—the review of documents for privileged information or attorney work-product. Both the federal rules and proposed NC amendments attempt to provide some relief to litigants in navigating this process.

FEDERAL RULES OF CIVIL PROCEDURE

FRCP 26(f) directs parties to discuss any issues relating to claims of privilege or protection of attorney-work product during the meet and confer discovery meeting. Parties are encouraged to agree on procedures to assert privilege or attorney work-product protection claims in the event of inadvertent production. Such agreements may be included in the court's Rule 16 scheduling order.

The committee notes to Rule 26 suggest two different protocols for protecting privileged information while minimizing the costs of search and review. The first involves a clawback agreement. Under such an agreement, the producing part notifies the receiving party that a document containing privileged or work-product information has been produced inadvertently and requests the document's return. The parties agree that a document's inadvertent production will not be considered a waiver of privilege as to that document or its contents or deemed to give

[47] The court may combine the discovery conference with the Rule 16 pre-trial conference.

rise to a subject-matter waiver. The second involves a quick peek agreement. The producing party provides specified categories of documents for initial examination by the other party or parties; each receiving party then identifies by formal request under Rule 34 the documents it wants produced. The producing party can then claim privilege or work-product protection as to documents included in such designation while producing other documents that have been identified for production by the requesting party. The parties agree that the initial provision of the privileged or work-product material for examination does not constitute a waiver as to that or any other material.

In the event that agreement is not reached, FRCP 26(b)(5)(A) sets forth a procedure for withholding information because of a claim that it is privileged or protected as attorney work-product. The party claiming the privilege or protection must make the claim expressly and describe the nature of the documents, communications, or things not produced to enable the other party to assess the applicability of the privilege or protection.

Rule 26(b)(5)(B) prescribes a default protocol for reclaiming privileged information that is produced. If a party has produced information in discovery that it claims is privileged or protected as attorney work-product, the party may notify the receiving party of the claim, stating the basis for the assertion. After receiving notification, the receiving party must return, sequester, or destroy the information and may not use it or disclose it to third parties until the claim is resolved. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether a waiver has occurred. A receiving party that has disclosed or provided the information to a nonparty before getting notice must take reasonable steps to obtain the return of the information. The producing party must preserve the information pending the court's ruling on whether the information is privileged or protected and whether any privilege or work-product protection has been waived or forfeited by the production. The goal of this Rule is to preserve the status quo until the court can decide the disputed privilege or work-product questions.

Beyond reclaiming the privileged information, the issue of waiver of the privileged status of the information itself is of great concern to litigants. Even if privileged information protocols, such as the clawback and quick peek agreements described above, are incorporated into court orders, they may provide protection only in the proceeding in which they are entered. An agreement between two or more parties in litigation does not 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 issues of scope of waiver, inadvertent disclosure, selective waiver by disclosure to a federal office or agency, and the controlling effect of court orders and agreements, Congress amended the Federal Rules of Evidence in 2008 to add Rule 502. The rule resolves conflicts among federal courts concerning the effect of voluntary and inadvertent productions of privileged material and seemingly imposes federal evidentiary rules on state courts. The rule requires that parties take reasonable steps to protect the information, though. Rule 502 went into effect in September 2008; it is yet to be determined if it will deliver on its

promised cost relief to litigants with respect to searching and reviewing ESI for privileged information and attorney work-product.[48]

PROPOSED N.C. AMENDMENTS

The proposed NC amendments likewise encourage parties to discuss and agree to methods for asserting or preserving claims of privilege or of protection of the information as attorney work-product during the Rule 26(f) discovery meeting. The amendments also mirror the provisions in FRCP 26(b)(5)(A) and (B), with one exception. The default protocol for reclaiming information only applies to inadvertently disclosed privileged or protected information.

[48] Rhoads Industries Inc. v. Building Materials Corp. of America, 2008 U.S. Dist. LEXIS 93333 (E.D. Pa. Nov. 14, 2008), is one of the first cases to interpret Rule 502. The opinion highlights some of the challenges that litigants face in attempting to avoid waivers of privileged information.