POST-2011 CIVIL PROCEDURE AND EVIDENCE

Special Superior Court Judge Shannon R. Joseph
October 2012 conference

Session Law 2011-199/House Bill 380
Session Law 2011-283/House Bill 542
Session Law 2011-247/House Bill 379
Session Law 2011-332/Senate Bill 300
Session Law 2011-400/Senate Bill 33

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I. SERVICE OF DOCUMENTS OTHER THAN ORIGINAL COMPLAINT (N.C. R. CIV. P. 5)

A. Amended Rule 5(b) (SL 2011-332; SB 300) applies to "service made" on or after 1 October 2011. As it did before, the rule provides permissible methods for service for documents subsequent to the original complaint which are permitted or required to be served. It also states that the Rule 4 methods for service and return of process work.

B. Amended Rule 5(b) prescribes different methods for serving counsel than for serving a party.

1. On Counsel – Rule 5(b)(1) allows for service by mail to the attorney's office or delivery to the attorney. Delivery to an attorney includes handing the document to the attorney, leaving it at the attorney's office with a partner or employee, or by faxing it by 5:00 pm.

2. On a Party –Rule 5(b)(2) allows for service by mail to the last known address or delivery to the party. Delivery to a party includes ONLY "handing it to the party," not faxing and not leaving it with resident of house (unless all requirements of Rule 4 are met). If no address is known, service of a document is made by "filing it with the clerk of court."

C. In practice: Be particularly mindful of the new service rules when a *pro se* litigant fails to appear for a hearing. Examining certificates of service of the motion or notice of hearing may be prudent.

II. PRETRIAL ORDER (N.C. R. Civ. P. 16)

A. N.C. R. Civ. P. 16(a) (SL 2011-199; HB 380) now specifies that, if a pre-trial conference is conducted at the direction of the court, the judge "*shall*" (previously may) make an order that includes matters dealt with in pre-trial conference held at judge's discretion.

B. In practice: Query whether this amendment is not simply a codification of current practice.

III. CASE MANAGEMENT AND DISCOVERY ISSUES: FOCUS ON ELECTRONICALLY-STORED INFORMATION

A. Overview

1. The discovery rules were amended to encourage and enforce more structure and communication in case management and discovery, particularly with regard to *electronically-stored information* (ESI). Indeed, the law is entitled "An Act To Clarify the Procedure for Discovery of Electronically Stored Information and to Make Conforming Changes to the North Carolina Rules of Civil

Procedure." (SL 2011-199; HB 380) It applies to actions filed on or after 1 October 2011. Amended rule provisions are based on, but not identical to, provisions of the federal rules.

2. The Act specifies that the "Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, 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."

3. These comments provide a good resource for the context and purpose of the amendments. The comments also refer to other resources that may provide guidance, such as analogous portions of the federal rules and the *Sedona Principles: Second Edition, Best Practices Recommendations and Principles for Addressing Electronic Document Production*, June 2007). Information published by the Sedona Conference is available at https://thesedonaconference.org/publications#ediscovery .

B. Case Management

1. Amended Rule 26(f) remodels the discovery plan portion of the rule, which formerly specified only that the court had discretion to order the parties to a discovery conference before it. Now, the rule also specifically authorizes a party to initiate the process by filing a request for a meeting on discovery, including discovery of ESI. When such a request is made, the parties must convene a discovery conference. N.C. R. Civ. P. 26(f)(1).

2. The rule specifies that the parties *shall* consider certain subjects to formulate a discovery plan, including preservation of ESI, format and procedures for production, and issues relating to restoration of ESI. N.C. R. Civ. P. 26(f)(2).

3. The parties then submit to the court a proposed plan or joint report. A "discovery plan *shall* contain" certain information including discovery deadlines and, when appropriate, a plan for preserving ESI and whether discovery should be conducted in phases. N.C. R. Civ. P. 26(f)(3). The lawyer for the first plaintiff listed is responsible for submitting the proposed plan or joint report, unless the parties agree otherwise. N.C. R. Civ. P. 26(f)(2).

4. If the parties agree on a discovery plan, "the plan shall be submitted to the court within 14 days after the meeting, and the parties may request a conference with the court regarding the plan." N.C. R. Civ. P. 26(f)(2).

5. If the parties do not agree

   a. They "shall submit . . . a joint report containing those parts of a discovery plan upon which they agree and the position of each of the parties on the parts upon which they disagree." *Id.*

   b. Any party may move for a discovery conference before the court "at which the court *shall* order the entry of a discovery plan" after consideration of the report submitted. N.C. R. Civ. P. 26(f)(4).

6. Discovery plans for medical malpractice actions continue to be governed by a separate subsection of Rule 26, now labeled as Rule 26(g).

C. Discovery Of ESI and Reasonable Accessibility of Files and Metadata

1. ESI is different from conventional documents in many ways, including volume, number of locations, data content and volatility. The amendments to the rules attempt to address the quantitative and qualitative differences.

2. ESI, unlike hard document copies, contains metadata-- information embedded in an electronic file about the file which is not visible on the screen view of the file. For example, metadata in word processing documents typically include information about edits made to the document.

   a. Along with the screen view of the file, Rule 26(b)(1) defines ESI to include "reasonably accessible metadata" that reflects such information as date sent, date received, author, and recipients.

   b. Rule 26(b)(1) excludes other metadata unless the parties agree or the court orders otherwise for good cause shown.

4. A party may object to discovery of ESI on the ground that the ESI is not reasonably accessible because of undue burden or cost. N.C. R. Civ. P. 34(b). The party asserting such an objection bears the burden to show that the burden or cost renders the ESI "not reasonably accessible." N.C. R. Civ. P. 26(c), 37(a)(2) & 45. Even if that burden is met, for good cause the court may nevertheless order the discovery. N.C. R. Civ. P. 26(c) & 45.

5. A party may object to the requested form for production of ESI. But the party cannot simply rest on the objection: it must specify the form it intends to use. Similarly, if the form for production of ESI is

not specified, it must be produced in "a reasonably usable form or forms." N.C. R. Civ. P. 34 & 45(d)(2). In other words, the producing party cannot just say "no" if no form for production is specified; production in some form must be made.

6. Production of documents and ESI must be done in a cogent manner. N.C. R. Civ. P. 34(b)(1-3) & 45(d)(1-3). Specifically, like Rule 45 historically has mandated, Rule 34 now requires that ESI and documents must be produced *either* as they are kept in the usual course or labeled to correspond to the request. The same ESI need not be produced in more than one form.

D. Allocations of Burden and Cost

1. The court may "specify the conditions for the discovery [of ESI], including allocation of discovery costs." N.C. R. Civ. P. 26(b)(3)[1], *see also* N.C. R. Civ. P. 45(d)(4). While this rule may not deviate from current practice, its codification is a reflection of the burdens that discovery of ESI may impose on a producing party that are quantitatively different (both in volume and expense) than for non-ESI discovery.

2. Other than cost shifting, methods to allocate the burden of ESI discovery can include:

- a limit on the sources of discovery (excluding sources such as personal devices, certain servers, home computers, back-up tapes);
- use of sampling techniques to evaluate whether additional production is warranted; and/or
- specification the types of search(es) required.

[1] At the time of the preparation of this paper, there was a difference in the numbering of the subparagraphs of N.C. R. Civ. P. 26(b) as the Act was printed in the Session Law and as reprinted on Lexis®. *E.g.*, "Specific Limitations on Electronically Stored Information" is N.C. R. Civ. P. 26*(b)(3)* in SL 2011-199, but is N.C. R. Civ. P. 26*(b)(1b)* on Lexis®. This paper cites to the subparagraph numbering as it appeared in SL 2011-199.

E. Preservation and Loss of ESI

1. The law requires parties to preserve information when litigation is pending or reasonably anticipated or be subject to sanctions, including the doctrine of spoliation. The scope of preservation of ESI for litigation purposes is not expressly addressed by the rules. If the parties convene a Rule 26(f) discovery conference, either voluntarily or because ordered to do so, the discovery plan "*shall*" contain "if appropriate under the circumstances of the case, a reference to the preservation of such information." N.C. R. Civ. P. 26(f)(3)(iii).

2. Like its federal counterpart, N.C. R. Civ. P. 37(c) specifies that failure to produce ESI lost "as a result of routine, good-faith operation of an electronic information system" should not result in sanctions "absent exceptional circumstances."

3. When evaluating the reasonableness and good faith of efforts to preserve ESI for litigation, a court should consider when the duty to preserve arose and what types of efforts were undertaken relative to information systems at issue.

F. Privilege Claims and Claw-back of Inadvertently Produced Documents

1. Privilege log required. N.C. R. Civ. P. 26(b)(7)(a)[2] requires a privilege log when a party withholds otherwise discoverable information. In particular, for any withheld information, the party must "(i) expressly make the [privilege] claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that . . . will enable other parties to assess the claim."

2. Claw-back of inadvertently-produced, privileged information

   a. With voluminous production comes increased risk and likelihood for inadvertent production of privileged information, even with reasonable precautions.

   b. N.C. R. Civ. P. 26(b)(7)(b) codifies a common practice among parties to include in their discovery scheduling order a "claw-back" provision. Such provision allows a producing party to request return of inadvertently-produced information which the party claims to be privileged. The requesting or

[2] *See* Note 1.

receiving party "may promptly present the information to the court under seal for determination of the claim."

c. Claw-back is not automatic, however. Even if the information is privileged, waiver may be shown. *See, e.g.*, *Blythe v. Bell*, 2012 NCBC 42 (2012) (finding waiver where counsel produced two hard drives of documents without reviewing the contents, relying on its discovery vendor's assurance that documents with the extension "hickorylaw.com" had been segregated from the production).

G. Excellent Resource for E-discovery Information

https://thesedonaconference.org/publications#ediscovery

In particular, *The Sedona Conference® Cooperation Proclamation: Resources for the Judiciary* (August 2011 Public Comment Version) contains references and citations to sample orders, guidelines developed in state and federal districts, and judicial management strategies.

IV. OUT-OF-STATE DISCOVERY IN NORTH CAROLINA CASES (N.C. R. CIV. P. 45(f))

A. The North Carolina Interstate Depositions and Discovery Act and the conforming amendments to the rules of civil procedure (SL 2011-247/HB 379) revamp the process for obtaining non-party discovery in both out-of-state actions (seeking discovery in North Carolina) and North Carolina actions seeking out-of state, non-party discovery.

B. For North Carolina cases, a 20-day time limit is imposed for hearing motions seeking issuance of a commission to obtain discovery in another state. N.C. R. Civ. P. 45(f)(2)(d) & (e).

C. The parties must confer, or attempt in good faith to confer, before the motion is filed. N.C. R. Civ. P. 45(f)(2)(d).

D. If the motion does not indicate consent or whether the moving party has attempted to confer, any party opposing the motion must file written objections within 10 days of service of the motion, "and the motion shall immediately be placed on the calendar for a hearing to be held within 20 days before the court in which the action is pending." Telephone hearings are expressly authorized. N.C. R. Civ. P. 45(f)(2)(e).

E. Grounds to deny the motion and refuse to issue the commission:

1. if the court determines in its discretion that the moving party failed to make "reasonable, good faith efforts to confer with all other parties prior to filing the motion," N.C. R. Civ. P. 45(f)(2)(d); or

2. "only upon a showing of substantial good cause to deny the motion." N.C. R. Civ. P. 45(f)(2)(e).

F. Attorneys' fees, costs, and expenses incurred in obtaining the commission may be awarded to the movant if the "court, in its discretion, determines that any party opposing the motion did so without good cause," "unless circumstances exist which make an award of expenses unjust." N.C. R. Civ. P. 45(f)(2)(f).

V. MEDICAL EXPENSES EVIDENCE (N.C. R. Evid. 414; N.C. Gen. Stat. § 8-58.1)

A. What: Medical expenses evidence "shall be limited to evidence of amounts *actually paid to satisfy* the bills that have been satisfied" and "the amounts *actually necessary to satisfy*" bills that have not been paid. N.C. R. Evid. 414 (SL 2011-283/HB 542).

1. The rule does not disturb the collateral source rule that medical expenses are recoverable regardless of the source of the payment.

2. The rule appears to be directed at insurance contract rates. It does not create "an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled." *Id.*

B. Who: To establish the amount paid or required to be paid for medical or funeral expenses, the "injured party or his guardian, administrator, or executor" may testify about the amounts paid or required to be paid in full satisfaction of the charges, if "records or copies of such charges showing the amount paid or required to be paid" accompany the testimony. N.C. Gen. Stat. § 8-58.1(a).

This procedure is the same as it has been, with the exception that the testimony and records must reflect amounts paid (not the charges).

C. How: The statute creates a series of presumptions upon the tender of certain testimony. N.C. Gen. Stat. § 8-58.1(b).

1. Testimony of the amounts paid or required to be paid "establishes a rebuttable presumption of the reasonableness of the amount paid or required to be paid."

2. Testimony by the provider of the services that a lesser amount satisfied the charge or can satisfy an unpaid charge rebuts the presumption of reasonableness as to that charge, and establishes a rebuttable presumption that the lesser amount is the reasonable amount of the charges.

3. Whether the charges were necessary because of acts or omissions by an alleged tortfeasor is not the subject of any presumption.

VI. EXPERT ADMISSIBILITY (N.C. R. Evid. 702(a)(1-3))

A. Remember that federal-style gatekeeping has arrived (or returned, depending on your perspective). This topic was covered in June 2012 by the Honorable Sanford L. Steelman, Jr.

B. Do not be surprised to see more vigorous expert admissibility challenges at the summary judgment phase, as well as at trial.

VII. BIFURCATION (N.C. R. Civ. P. 42)

A. In any *tort* case in which the plaintiff seeks damages greater than $150,000, upon the motion of any party, the court "*shall* order separate trial for the issue of liability and the issues of damages, *unless the court for good cause shown* orders a single trial." N.C. R. Civ. P. 42(b)(3), (SL 2011-400/SB 33).

B. Evidence relating "solely to compensatory damages shall not be admissible until the trial of fact has determined that the defendant is liable." *Id.*

C. The same trier of fact "shall" decide both liability and damages. *Id.*

D. <u>In practice</u>: Even when a case is bifurcated, sequentially number issues as the case moves forward. Do not start over with "Issue One" at each phase.