

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE BILL 380
PROPOSED COMMITTEE SUBSTITUTE H380-PCS70204-RW-29

Short Title: Amend RCP/Electronically Stored Information.

(Public)

Sponsors:

Referred to:

March 17, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO CLARIFY THE PROCEDURE FOR DISCOVERY OF ELECTRONICALLY
3 STORED INFORMATION AND TO MAKE CONFORMING CHANGES TO THE
4 NORTH CAROLINA RULES OF CIVIL PROCEDURE.

5 The General Assembly of North Carolina enacts:

6 SECTION 1. G.S. 1A-1, Rule 16, reads as rewritten:

7 "Rule 16. Pre-trial procedure; formulating issues.

8 (a) In any action, the judge-court may in his-its discretion direct the attorneys for the
9 parties to appear before him-the court for a conference to consider

- 10 (1) The simplification and formulation of the issues;
11 (2) The necessity or desirability of amendments to the pleadings;
12 (3) The possibility of obtaining admissions of fact and of documents which will
13 avoid unnecessary proof;
14 (4) The limitation of the number of expert witnesses;
15 (5) The advisability or necessity of a reference of the case, either in whole or in
16 part;
17 (6) Matters of which the court is to be asked to take judicial notice;
18 (7) Such other matters as may aid in the disposition of the action.

19 If a conference is held, the judge may-shall make an order which recites the action taken at
20 the conference, the-any amendments allowed to the pleadings, and the-any agreements made by
21 the parties as to any of the matters considered, and which limits-may limit the issues for trial to
22 those not disposed of by admissions or agreements of counsel; and such order when entered
23 controls the subsequent course of the action, unless modified at the trial to prevent manifest
24 injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance
25 with the provisions of Rule 8, upon motion of any party, the order shall require amendment of
26 the pleadings.

27 (b) In a medical malpractice action as defined in G.S. 90-21.11, at the close of the
28 discovery period scheduled pursuant to Rule 26(f1), Rule 26(g), the judge shall schedule a final
29 conference. After the conference, the judge shall refer any consent order calendaring the case
30 for trial to the senior resident superior court judge or the chief district court judge, who shall
31 approve the consent order unless he-the judge finds that:

- 32 (1) The date specified in the order is unavailable,
33 (2) The terms of the order unreasonably delay the trial, or
34 (3) The ends of justice would not be served by approving the order.



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1 If the senior resident superior court judge or the chief district court judge does not approve
2 the consent order, ~~he~~ the judge shall calendar the case for trial.

3 In calendaring the case, the court shall take into consideration the nature and complexity of
4 the case, the proximity and convenience of witnesses, the needs of counsel for both parties
5 concerning their respective calendars, the benefits of an early disposition and such other
6 matters as the court may deem proper."

7 **SECTION 2.** G.S. 1A-1, Rule 26, reads as rewritten:

8 **"Rule 26. General provisions governing discovery.**

9 (a) Discovery methods. – Parties may obtain discovery by one or more of the following
10 methods: depositions upon oral examination or written questions; written interrogatories;
11 production of documents or things or permission to enter upon land or other property, for
12 inspection and other purposes; physical and mental examinations; and requests for admission.

13 (b) Discovery scope and limits. – Unless otherwise limited by order of the court in
14 accordance with these rules, the scope of discovery is as follows:

15 (1) In General. – Parties may obtain discovery regarding any matter, not
16 privileged, which is relevant to the subject matter involved in the pending
17 action, whether it relates to the claim or defense of the party seeking
18 discovery or to the claim or defense of any other party, including the
19 existence, description, nature, custody, condition and location of any books,
20 documents, electronically stored information, or other tangible things and
21 the identity and location of persons having knowledge of any discoverable
22 matter. It is not ground for objection that the information sought will be
23 inadmissible at the trial if the information sought appears reasonably
24 calculated to lead to the discovery of admissible evidence nor is it grounds
25 for objection that the examining party has knowledge of the information as
26 to which discovery is sought. For the purposes of these rules regarding
27 discovery, the phrase 'electronically stored information' includes reasonably
28 accessible metadata that will enable the discovering party to have the ability
29 to access such information as the date sent, date received, author, and
30 recipients. The phrase does not include other metadata unless the parties
31 agree otherwise or the court orders otherwise upon motion of a party and a
32 showing of good cause for the production of certain metadata.

33 (2) Limitations on Frequency and Extent. – The frequency or extent of use of
34 the discovery methods set forth in section (a) shall be limited by the court if
35 it determines that: (i) the discovery sought is unreasonably cumulative or
36 duplicative, or is obtainable from some other source that is more convenient,
37 less burdensome, or less expensive; (ii) the party seeking discovery has had
38 ample opportunity by discovery in the action to obtain the information
39 sought; or (iii) the discovery is unduly burdensome or expensive, taking into
40 account the needs of the case, the amount in controversy, limitations on the
41 parties' resources, and the importance of the issues at stake in the litigation.
42 The court may act upon its own initiative after reasonable notice or pursuant
43 to a motion under section (c).

44 (3) Specific Limitations on Electronically Stored Information. – In addition to
45 any limitations imposed by subdivision (b)(2) of this rule, discovery of
46 electronically stored information is subject to the limitations set forth in Rule
47 34(b). The court may specify conditions for the discovery, including
48 allocation of discovery costs.

49 ~~(2)~~(4) Insurance Agreements. – A party may obtain discovery of the existence and
50 contents of any insurance agreement under which any person carrying on an
51 insurance business may be liable to satisfy part or all of a judgment which

1 may be entered in the action or to indemnify or reimburse for payments
2 made to satisfy the judgment. Information concerning the insurance
3 agreement is not by reason of disclosure admissible in evidence at trial. For
4 purposes of this subsection, an application for insurance shall not be treated
5 as part of an insurance agreement.

6 ~~(3)~~(5) Trial Preparation; Materials. – Subject to the provisions of subsection ~~(b)(4)~~
7 ~~(b)(6)~~ of this rule, a party may obtain discovery of documents and tangible
8 things otherwise discoverable under subsection (b)(1) of this rule and
9 prepared in anticipation of litigation or for trial by or for another party or by
10 or for that other party's consultant, surety, indemnitor, insurer, or agent only
11 upon a showing that the party seeking discovery has substantial need of the
12 materials in the preparation of ~~his~~the case and that ~~he~~the party is unable
13 without undue hardship to obtain the substantial equivalent of the materials
14 by other means. In ordering discovery of such materials when the required
15 showing has been made, the court may not permit disclosure of the mental
16 impressions, conclusions, opinions, or legal theories of an attorney or other
17 representative of a party concerning the litigation in which the material is
18 sought or work product of the attorney or attorneys of record in the
19 particular action.

20 A party may obtain without the required showing a statement concerning
21 the action or its subject matter previously made by that party. Upon request,
22 a person not a party may obtain without the required showing a statement
23 concerning the action or its subject matter previously made by that person. If
24 the request is refused, the person may move for a court order. The provisions
25 of Rule 37(a)(4) apply to the award of expenses incurred in relation to the
26 motion. For purposes of this paragraph, a statement previously made is (i) a
27 written statement signed or otherwise adopted or approved by the person
28 making it, or (ii) a stenographic, mechanical, electrical, or other recording,
29 or a transcription thereof, which is a substantially verbatim recital of an oral
30 statement by the person making it and contemporaneously recorded.

31 ~~(4)~~(6) Trial Preparation; Experts. – Discovery of facts known and opinions held by
32 experts, otherwise discoverable under the provisions of subsection (b)(1) of
33 this rule and acquired or developed in anticipation of litigation or for trial,
34 may be obtained only as follows:

- 35 a. 1. A party may through interrogatories require any other party to
36 identify each person whom the other party expects to call as
37 an expert witness at trial, to state the subject matter on which
38 the expert is expected to testify, and to state the substance of
39 the facts and opinions to which the expert is expected to
40 testify and a summary of the grounds for each opinion.
- 41 2. Upon motion, the court may order further discovery by other
42 means, subject to such restrictions as to scope and such
43 provisions, pursuant to ~~subdivision~~sub-subdivision ~~(b)(4)e~~
44 ~~(b)(6)b.~~ of this rule, concerning fees and expenses as the court
45 may deem appropriate.
- 46 b. Unless manifest injustice would result, (i) the court shall require that
47 the party seeking discovery pay the expert a reasonable fee for time
48 spent in responding to discovery under subdivision ~~(b)(4)a2~~(b)(6)a2
49 of this rule; and (ii) with respect to discovery obtained under
50 subdivision ~~(b)(4)a2~~(b)(6)a2 of this rule the court may require the
51 party seeking discovery to pay the other party a fair portion of the

1 fees and expenses reasonably incurred by the latter party in obtaining
2 facts and opinions from the expert.

3 (7) Claiming privilege or protecting trial-preparation materials.

4 a. Information withheld. – When a party withholds information
5 otherwise discoverable by claiming that the information is privileged
6 or subject to protection as trial-preparation material, the party must
7 (i) expressly make the claim and (ii) describe the nature of the
8 documents, communications, or tangible things not produced or
9 disclosed, and do so in a manner that, without revealing information
10 itself privileged or protected, will enable other parties to assess the
11 claim.

12 b. Information produced. – If information subject to a claim of privilege
13 or protection as trial-preparation material is inadvertently produced
14 in response to a discovery request, the party that produced the
15 material may assert the claim by notifying any party that received the
16 information of the claim and basis for it. After being notified, a party
17 (i) must promptly return, sequester, or destroy the specified
18 information and any copies it has, (ii) must not use or disclose the
19 information until the claim is resolved, (iii) must take reasonable
20 steps to retrieve the information if the party disclosed it before being
21 notified, and (iv) may promptly present the information to the court
22 under seal for determination of the claim. The producing party must
23 preserve the information until the claim is resolved.

24 (c) Protective orders. – Upon motion by a party or by the person from whom discovery
25 is sought, and for good cause shown, the judge of the court in which the action is pending may
26 make any order which justice requires to protect a party or person from unreasonable
27 annoyance, embarrassment, oppression, or undue burden or expense, including one or more of
28 the following: (i) that the discovery not be had; (ii) that the discovery may be had only on
29 specified terms and conditions, including a designation of the time or place; (iii) that the
30 discovery may be had only by a method of discovery other than that selected by the party
31 seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the
32 discovery be limited to certain matters; (v) that discovery be conducted with no one present
33 except persons designated by the court; (vi) that a deposition after being sealed be opened only
34 by order of the court; (vii) that a trade secret or other confidential research, development, or
35 commercial information not be disclosed or be disclosed only in a designated way; (viii) that
36 the parties simultaneously file specified documents or information enclosed in sealed envelopes
37 to be opened as directed by the court.

38 A party seeking a protective order on the basis that electronically stored information sought
39 is from a source identified as not reasonably accessible because of undue burden or cost has the
40 burden of showing that the basis exists. If the showing is made, the court may nonetheless order
41 discovery from the source if the requesting party shows good cause, but only after considering
42 the limitations of subsection (b)(2) of this rule.

43 If the motion for a protective order is denied in whole or in part, the court may, on such
44 terms and conditions as are just, order that any party or person provide or permit discovery. The
45 provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

46 (d) Sequence and timing of discovery. – Unless the court upon motion, for the
47 convenience of parties and witnesses and in the interests of justice, orders otherwise, methods
48 of discovery may be used in any sequence and the fact that a party is conducting discovery,
49 whether by deposition or otherwise, shall not operate to delay any other party's discovery. Any
50 order or rule of court setting the time within which discovery must be completed shall be
51 construed to fix the date after which the pendency of discovery will not be allowed to delay

1 trial or any other proceeding before the court, but shall not be construed to prevent any party
2 from utilizing any procedures afforded under Rules 26 through 36, so long as trial or any
3 hearing before the court is not thereby delayed.

4 (e) Supplementation of responses. – A party who has responded to a request for
5 discovery with a response that was complete when made is under no duty to supplement ~~his~~the
6 party's response to include information thereafter acquired, except as follows:

7 (1) A party is under a duty seasonably to supplement ~~his~~the party's response
8 with respect to any question directly addressed to (i) the identity and location
9 of persons having knowledge of discoverable matters, and (ii) the identity of
10 each person expected to be called as an expert witness at trial, the subject
11 matter on which ~~he~~the person is expected to testify, and the substance of ~~his~~
12 the testimony.

13 (2) A party is under a duty seasonably to amend a prior response if ~~he~~the party
14 obtains information upon the basis of which (i) ~~he~~the party knows that the
15 response was incorrect when made, or (ii) ~~he~~the party knows that the
16 response though correct when made is no longer true and the circumstances
17 are such that a failure to amend the response is in substance a knowing
18 concealment.

19 (3) A duty to supplement responses may be imposed by order of the court,
20 agreement of the parties, or at any time prior to trial through new requests
21 for supplementation of prior responses.

22 (f) ~~Discovery conference. meeting, discovery conference, discovery plan. – At any time~~
23 ~~after commencement of an action the court may direct the attorneys for the parties to appear~~
24 ~~before it for a conference on the subject of discovery. The court may do so upon motion by the~~
25 ~~attorney for any party if the motion includes:~~

26 (1) ~~A statement of the issues as they then appear;~~

27 (2) ~~A proposed plan and schedule of discovery;~~

28 (3) ~~Any limitations proposed to be placed on discovery;~~

29 (4) ~~Any other proposed orders with respect to discovery; and~~

30 (5) ~~A statement showing that the attorney making the motion has made a reasonable~~
31 ~~effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each~~
32 ~~party and his attorney are under a duty to participate in good faith in the framing of a discovery~~
33 ~~plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on~~
34 ~~all parties. Objections or additions to matters set forth in the motion shall be served not later~~
35 ~~than 10 days after service of the motion.~~

36 ~~Following the discovery conference, the court shall enter an order tentatively identifying~~
37 ~~the issues for discovery purposes, establishing a plan and schedule for discovery, setting~~
38 ~~limitations on discovery, if any; and determining such other matters, including the allocation of~~
39 ~~expenses, as are necessary for the proper management of discovery in the action. An order may~~
40 ~~be altered or amended whenever justice so requires.~~

41 ~~Subject to the right of a party who properly moves for a discovery conference to prompt~~
42 ~~convening of the conference, the court may combine the discovery conference with a pretrial~~
43 ~~conference authorized by Rule 16.~~

44 (1) No earlier than 40 days after the complaint is filed in an action, any party's
45 attorney or an unrepresented party may request a meeting on the subject of
46 discovery, including the discovery of electronically stored information. If
47 such a request is filed, the parties shall meet in the county in which the
48 action is pending not less than 21 days after the initial request for a meeting
49 is filed and served upon the parties, unless agreed otherwise by the parties or
50 their attorneys and unless an earlier time for the meeting is ordered by the
51 court or agreed by the parties. Even if the parties or their attorneys do not

1 seek to have a discovery meeting, at any time after commencement of an
2 action the court may direct the parties or their attorneys to appear before it
3 for a discovery conference.

4 (2) During a discovery meeting held pursuant to subdivision (f)(1) of this rule,
5 the attorneys and any unrepresented parties shall (i) consider the nature and
6 basis of the parties' claims and defenses and the possibilities for promptly
7 settling or resolving the case and (ii) discuss the preparation of a discovery
8 plan as set forth in subdivision (f)(3) of this rule. Attorneys for the parties,
9 and any unrepresented parties, that have appeared in the case are jointly
10 responsible for arranging the meeting, for being prepared to discuss a
11 discovery plan, and for attempting in good faith to agree on a discovery plan.
12 The meeting may be held by telephone, by videoconference, or in person, or
13 a combination thereof, unless the court, on motion, orders the attorneys and
14 the unrepresented parties to attend in person. If a discovery plan is agreed
15 upon, the plan shall be submitted to the court within 14 days after the
16 meeting, and the parties may request a conference with the court regarding
17 the plan. If the parties do not agree upon a discovery plan, they shall submit
18 to the court within 14 days after the meeting a joint report containing those
19 parts of a discovery plan upon which they agree and the position of each of
20 the parties on the parts upon which they disagree. Unless the parties agree
21 otherwise, the attorney for the first plaintiff listed on the complaint shall be
22 responsible for submitting the discovery plan or joint report.

23 (3) A discovery plan shall contain the following: (i) a statement of the issues as
24 they then appear; (ii) a proposed plan and schedule of discovery, including
25 the discovery of electronically stored information; (iii) with respect to
26 electronically stored information, and if appropriate under the circumstances
27 of the case, a reference to the preservation of such information, the media
28 form, format, or procedures by which such information will be produced, the
29 allocation of the costs of preservation, production, and, if necessary,
30 restoration, of such information, the method for asserting or preserving
31 claims of privilege or of protection of the information as trial-preparation
32 materials if different from that provided in subdivision (b)(7) of this rule, the
33 method for asserting or preserving confidentiality and proprietary status, and
34 any other matters addressed by the parties; (iv) any limitations proposed to
35 be placed on discovery, including, if appropriate under the circumstances of
36 the case, that discovery be conducted in phases or be limited to or focused
37 on particular issues; (v) when discovery should be completed; and (vi) if
38 appropriate under the circumstances of the case, any limitations or
39 conditions pursuant to section (c) of this rule regarding protective orders.

40 (4) If the parties are unable to agree to a discovery plan at a meeting held
41 pursuant to subdivision (f)(1) of this rule, they shall, upon motion of any
42 party, appear before the court for a discovery conference at which the court
43 shall order the entry of a discovery plan after consideration of the report
44 required to be submitted under subdivision (f)(2) of this rule and the position
45 of the parties. The order may address other matters, including the allocation
46 of discovery costs, as are necessary for the proper management of discovery
47 in the action. An order may be altered or amended as justice may require.

48 The court may combine the discovery conference with a pretrial conference authorized by
49 Rule 16. A discovery conference in a medical malpractice action shall be governed by
50 subsection (g) of this rule.

1 ~~(f1)~~(g) Medical malpractice discovery conference. – In a medical malpractice action as
2 defined in G.S. 90-21.11, upon the case coming at issue or the filing of a responsive pleading or
3 motion requiring a determination by the court, the judge shall, within 30 days, direct the
4 attorneys for the parties to appear for a discovery conference. At the conference the court may
5 consider the matters set out in Rule 16 and subdivision (f)(3) of this rule and shall:

- 6 (1) Rule on all motions;
7 (2) Establish an appropriate schedule for designating expert witnesses,
8 consistent with a discovery schedule pursuant to subdivision (3), to be
9 complied with by all parties to the action such that there is a deadline for
10 designating all expert witnesses within an appropriate time for all parties to
11 implement discovery mechanisms with regard to the designated expert
12 witnesses;
13 (3) Establish by order an appropriate discovery schedule designated so that,
14 unless good cause is shown at the conference for a longer time, and subject
15 to further orders of the court, discovery shall be completed within 150 days
16 after the order is issued; nothing herein shall be construed to prevent any
17 party from utilizing any procedures afforded under Rules 26 through 36, so
18 long as trial or any hearing before the court is not thereby delayed; and
19 (4) Approve any consent order which may be presented by counsel for the
20 parties relating to ~~parts~~ subdivisions (2) and (3) of this subsection, unless the
21 court finds that the terms of the consent order are unreasonable.

22 If a party fails to identify an expert witness as ordered, the court shall, upon motion by the
23 moving party, impose an appropriate sanction, which may include dismissal of the action, entry
24 of default against the defendant, or exclusion of the testimony of the expert witness at trial.

25 ~~(g)~~(h) Signing of discovery requests, responses, and objections. – Every request for
26 discovery or response or objection thereto made by a party represented by an attorney shall be
27 signed by at least one attorney of record in ~~his individual~~ that attorney's name, whose address
28 shall be stated. A party who is not represented by an attorney shall sign the request, response,
29 or objection and state ~~his~~ that party's address. The signature of the attorney or party constitutes
30 a certification that ~~he~~ the attorney or party has read the request, response, or objection and that
31 to the best of ~~his~~ the knowledge, information, and belief ~~of that attorney or party~~ formed after a
32 reasonable inquiry it is: (1) consistent with the rules and warranted by existing law or a good
33 faith argument for the extension, modification, or reversal of existing law; (2) not interposed
34 for any improper purpose, such as to harass or cause unnecessary delay or needless increase in
35 the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the
36 needs of the case, the discovery already had in the case, the amount in controversy, and the
37 importance of the issues at stake in the litigation. If a request, response, or objection is not
38 signed, it shall be stricken unless it is signed promptly after the omission is called to the
39 attention of the party making the request, response, or objection and a party shall not be
40 obligated to take any action with respect to it until it is signed.

41 If a certification is made in violation of the rule, the court, upon motion or upon its own
42 initiative, shall impose upon the person who made the certification, the party on whose behalf
43 the request, response, or objection is made, or both, an appropriate sanction, which may include
44 an order to pay the amount of the reasonable expenses incurred because of the violation,
45 including a reasonable attorney's fee."

46 **SECTION 3.** G.S. 1A-1, Rule 33(c), reads as rewritten:

47 "(c) Option to produce business records. – Where the answer to an interrogatory may be
48 derived or ascertained from the business ~~records~~ records, including electronically stored
49 information, of the party upon whom the interrogatory has been served or from an examination,
50 audit or inspection of such business records, or from a compilation, abstract or summary based
51 thereon, and the burden of deriving or ascertaining the answer is substantially the same for the

1 party serving the interrogatory as for the party served, it is a sufficient answer to such
2 interrogatory to specify the records from which the answer may be derived or ascertained and
3 to afford to the party serving the interrogatory reasonable opportunity to examine, audit or
4 inspect such records and to make copies, compilations, abstracts or summaries. A specification
5 shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily
6 as can the party served, the records from which the answer may be ascertained."

7 **SECTION 4.** G.S. 1A-1, Rule 34, reads as rewritten:

8 **"Rule 34. Production of ~~documents and things and~~ documents, electronically stored**
9 **information, and things; entry upon land for inspection and other purposes.**

10 (a) Scope. – Any party may serve on any other party a request (i) to produce and permit
11 the party making the request, or someone acting on ~~his~~ that party's behalf, to inspect and copy,
12 ~~any designated documents (including writings, drawings, graphs, charts, photographs,~~
13 ~~phono records, and other data compilations from which information can be obtained, translated,~~
14 ~~if necessary, by the respondent through detection devices into reasonably usable form), or to~~
15 ~~inspect and copy, test, or sample any~~ designated documents, electronically stored information,
16 or tangible things which constitute or contain matters within the scope of Rule 26(b) and which
17 are in the possession, custody or control of the party upon whom the request is served; or (ii) to
18 permit entry upon designated land or other property in the possession or control of the party
19 upon whom the request is served for the purpose of inspection and measuring, surveying,
20 photographing, testing, or sampling the property or any designated object or operation thereon,
21 within the scope of Rule 26(b).

22 (b) Procedure. – The request may, without leave of court, be served upon the plaintiff
23 after commencement of the action and upon any other party with or after service of the
24 summons and complaint upon that party. The request shall set forth the items to be inspected
25 either by individual item or by category, and describe each item and category with reasonable
26 particularity. The request shall specify a reasonable time, place, and manner of making the
27 inspection and performing the related acts. The request may specify the form or forms in which
28 electronically stored information is to be produced.

29 The party upon whom the request is served shall serve a written response within 30 days
30 after the service of the request, except that a defendant may serve a response within 45 days
31 after service of the summons and complaint upon that defendant. The court may allow a shorter
32 or longer time. The response shall state, with respect to each item or category, that inspection
33 and related activities will be permitted as requested, unless the request is objected to, in which
34 event the reasons for objection shall be stated. If objection is made to part of an item or
35 category, the part shall be specified. In addition to other bases for objection, the response may
36 state an objection to production of electronically stored information from sources that the party
37 identifies as not reasonably accessible because of undue burden or cost. The response may also
38 state an objection to a requested form for producing electronically stored information. If the
39 responding party objects to a requested form, or if no form is specified in the request, the party
40 must state the form or forms it intends to use. The party submitting the request may move for
41 an order under Rule 37(a) with respect to any objection to or other failure to respond to the
42 request or any part thereof, or any failure to permit inspection as requested.

43 Unless otherwise stipulated by the parties or ordered by the court, the following procedures
44 apply to producing documents or electronically stored information:

- 45 (1) A party must produce documents as they are kept in the usual course of
46 business or must organize and label them to correspond to the categories in
47 the request;
48 (2) If a request does not specify a form for producing the electronically stored
49 information, a party must produce it in a reasonably usable form or forms;
50 and

1 (3) A party need not produce the same electronically stored information in more
2 than one form.

3 (c) Form of response. – There shall be sufficient space following each request in which
4 the respondent may state the response. The respondent shall: (1) state the response in the space
5 provided, using additional pages if necessary; or (2) restate the request to be followed by the
6 response. An objection to a request shall be made by stating the objection and the reason
7 therefor either in the space following the request or following the restated request.

8 (e)(d) Persons not parties. – This rule does not preclude an independent action against a
9 person not a party for production of documents and things and permission to enter upon land."

10 **SECTION 5.** G.S. 1A-1, Rule 37, reads as rewritten:

11 **"Rule 37. Failure to make discovery; sanctions.**

12 (a) Motion for order compelling discovery. – A party, upon reasonable notice to other
13 parties and all persons affected thereby, may apply for an order compelling discovery as
14 follows:

15 (1) Appropriate Court. – An application for an order to a party or a deponent
16 who is not a party may be made to a judge of the court in which the action is
17 pending, or, on matters relating to a deposition where the deposition is being
18 taken in this State, to a judge of the court in the county where the deposition
19 is being taken, as defined by Rule 30(h).

20 (2) Motion. – If a deponent fails to answer a question propounded or submitted
21 under Rules 30 or 31, or a corporation or other entity fails to make a
22 designation under Rule 30(b)(6) or 31(a), or a party fails to answer an
23 interrogatory submitted under Rule 33, or if a party, in response to a request
24 for inspection submitted under Rule 34, fails to respond that inspection will
25 be permitted as requested or fails to permit inspection as requested, the
26 discovering party may move for an order compelling an answer, or a
27 designation, or an order compelling inspection in accordance with the
28 request. The motion must include a certification that the movant has in good
29 faith conferred or attempted to confer with the person or party failing to
30 make the discovery in an effort to secure the information or material without
31 court action. When taking a deposition on oral examination, the proponent of
32 the question shall complete the examination on all other matters before ~~he~~
33 ~~adjourns~~ the examination is adjourned, in order to apply for an order. If the
34 motion is based upon an objection to production of electronically stored
35 information from sources the objecting party identified as not reasonably
36 accessible because of undue burden or cost, the objecting party has the
37 burden of showing that the basis for the objection exists.

38 If the court denies the motion in whole or in part, it may make such
39 protective order as it would have been empowered to make on a motion
40 made pursuant to Rule 26(c).

41 (3) Evasive or Incomplete Answer. – For purposes of this subdivision an evasive
42 or incomplete answer is to be treated as a failure to answer.

43 (4) Award of Expenses of Motion. – If the motion is granted, the court shall,
44 after opportunity for hearing, require the party or deponent whose conduct
45 necessitated the motion or the party advising such conduct or both of them to
46 pay to the moving party the reasonable expenses incurred in obtaining the
47 order, including attorney's fees, unless the court finds that the opposition to
48 the motion was substantially justified or that other circumstances make an
49 award of expenses unjust.

50 If the motion is denied, the court shall, after opportunity for hearing,
51 require the moving party to pay to the party or deponent who opposed the

1 motion the reasonable expenses incurred in opposing the motion, including
2 attorney's fees, unless the court finds that the making of the motion was
3 substantially justified or that other circumstances make an award of expenses
4 unjust.

5 If the motion is granted in part and denied in part, the court may
6 apportion the reasonable expenses incurred in relation to the motion among
7 the parties and persons in a just manner.

8 (b) Failure to comply with order. –

9 (1) Sanctions by Court in County Where Deposition Is Taken. – If a deponent
10 fails to be sworn or to answer a question after being directed to do so by a
11 judge of the court in the county in which the deposition is being taken, the
12 failure may be considered a contempt of that court.

13 (2) Sanctions by Court in Which Action Is Pending. – If a party or an officer,
14 director, or managing agent of a party or a person designated under Rule
15 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to
16 provide or permit discovery, including an order made under section (a) of
17 this rule or Rule 35, or if a party fails to obey an order entered under Rule
18 26(f) a judge of the court in which the action is pending may make such
19 orders in regard to the failure as are just, and among others the following:

- 20 a. An order that the matters regarding which the order was made or any
21 other designated facts shall be taken to be established for the
22 purposes of the action in accordance with the claim of the party
23 obtaining the order;
- 24 b. An order refusing to allow the disobedient party to support or oppose
25 designated claims or defenses, or prohibiting ~~him~~ the party from
26 introducing designated matters in evidence;
- 27 c. An order striking out pleadings or parts thereof, or staying further
28 proceedings until the order is obeyed, or dismissing the action or
29 proceeding or any part thereof, or rendering a judgment by default
30 against the disobedient party;
- 31 d. In lieu of any of the foregoing orders or in addition thereto, an order
32 treating as a contempt of court the failure to obey any orders except
33 an order to submit to a physical or mental examination;
- 34 e. Where a party has failed to comply with an order under Rule 35(a)
35 requiring ~~him~~ the party to produce another for examination, such
36 orders as are listed in subdivisions a, b, and c of this subsection,
37 unless the party failing to comply shows that ~~he~~ the party is unable to
38 produce such person for examination.

39 In lieu of any of the foregoing orders or in addition thereto, the court
40 shall require the party failing to obey the order to pay the reasonable
41 expenses, including attorney's fees, caused by the failure, unless the court
42 finds that the failure was substantially justified or that other circumstances
43 make an award of expenses unjust.

44 (c) Failure to provide electronically stored information. – Absent exceptional
45 circumstances, a court may not impose sanctions under these rules on a party for failing to
46 provide electronically stored information lost as a result of routine, good-faith operation of an
47 electronic information system.

48 (e)(d) Expenses on failure to admit. – If a party fails to admit the genuineness of any
49 document or the truth of any matter as requested under Rule 36, and if the party requesting the
50 admissions thereafter proves the genuineness of the document or the truth of the matter, ~~he~~ the
51 requesting party may apply to the court for an order requiring the other party to pay to him or

1 her the reasonable expenses incurred in making that proof, including reasonable attorney's fees.
2 The court shall make the order unless it finds that (i) the request was held objectionable
3 pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii)
4 the party failing to admit had reasonable ground to believe that he or she might prevail on the
5 matter, or (iv) there was other good reason for the failure to admit.

6 ~~(d)~~(e) Failure of party to attend at own deposition or serve answers to interrogatories or
7 respond to request for inspection. – If a party or an officer, director, or managing agent of a
8 party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (i)
9 to appear before the person who is to take ~~his~~the deposition, after being served with a proper
10 notice, or (ii) to serve answers or objections to interrogatories submitted under Rule 33, after
11 proper service of the interrogatories, or (iii) to serve a written response to a request for
12 inspection submitted under Rule 34, after proper service of the request, the court in which the
13 action is pending on motion may make such orders in regard to the failure as are just, and
14 among others it may take any action authorized under subdivisions a, b, and c of subsection
15 (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party
16 failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure,
17 unless the court finds that the failure was substantially justified or that other circumstances
18 make an award of expenses unjust.

19 The failure to act described in this section may not be excused on the ground that the
20 discovery sought is objectionable unless the party failing to act has applied for a protective
21 order as provided by Rule 26(c).

22 ~~(e)~~, (f) Reserved for future codification purposes.

23 (g) Failure to participate in the framing of a discovery plan. – If a party or ~~his~~the party's
24 attorney fails to participate in good faith in the framing of a discovery plan by agreement as is
25 required by Rule 26(f), the court may, after opportunity for hearing, require such party or ~~his~~
26 the party's attorney to pay to any other party the reasonable expenses, including attorney's fees,
27 caused by the failure."

28 **SECTION 6.** G.S. 1A-1, Rule 45, reads as rewritten:

29 **"Rule 45. Subpoena.**

30 (a) Form; Issuance. –

31 (1) Every subpoena shall state all of the following:

- 32 a. The title of the action, the name of the court in which the action is
33 pending, the number of the civil action, and the name of the party at
34 whose instance the witness is summoned.
- 35 b. A command to each person to whom it is directed to attend and give
36 testimony or to produce and permit inspection and copying of
37 designated records, books, papers, documents, electronically stored
38 information, or tangible things in the possession, custody, or control
39 of that person therein specified.
- 40 c. The protections of persons subject to subpoenas under subsection (c)
41 of this rule.
- 42 d. The requirements for responses to subpoenas under subsection (d) of
43 this rule.

44 (2) A command to produce ~~evidence~~records, books, papers, electronically
45 stored information, or tangible things may be joined with a command to
46 appear at trial or hearing or at a deposition, or any subpoena may be issued
47 separately. A subpoena may specify the form or forms in which
48 electronically stored information is to be produced.

49 (3) A subpoena shall issue from the court in which the action is pending.

50 (4) The clerk of court in which the action is pending shall issue a subpoena,
51 signed but otherwise blank, to a party requesting it, who shall complete it

- 1 before service. Any judge of the superior court, judge of the district court,
2 magistrate, or attorney, as officer of the court, may also issue and sign a
3 subpoena.
- 4 (b) Service. –
- 5 (1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's
6 deputy, by a coroner, or by any person who is not a party and is not less than
7 18 years of age. Service of a subpoena upon a person named therein shall be
8 made by delivering a copy thereof to that person or by registered or certified
9 mail, return receipt requested. Service of a subpoena for the attendance of a
10 witness only may also be made by telephone communication with the person
11 named therein only by a sheriff, the sheriff's designee who is not less than 18
12 years of age and is not a party, or a coroner.
- 13 (2) Service of copy. – A copy of the subpoena served under subdivision ~~(1)~~
14 (b)(1) of this subsection shall also be served upon each party in the manner
15 prescribed by Rule 5(b). ~~This subdivision~~
- 16 (3) Subdivision (b)(2) of this subsection does not apply to subpoenas issued
17 under G.S. 15A-801 or G.S. 15A-802.
- 18 (c) Protection of Persons Subject to Subpoena. –
- 19 (1) Avoid undue burden or expense. – A party or an attorney responsible for the
20 issuance and service of a subpoena shall take reasonable steps to avoid
21 imposing an undue burden or expense on a person subject to the subpoena.
22 The court shall enforce this subdivision and impose upon the party or
23 attorney in violation of this requirement an appropriate sanction that may
24 include compensating the person unduly burdened for lost earnings and for
25 reasonable attorney's fees.
- 26 (2) For production of public records or hospital medical records. – Where the
27 subpoena commands any custodian of public records or any custodian of
28 hospital medical records, as defined in G.S. 8-44.1, to appear for the sole
29 purpose of producing certain records in the custodian's custody, the
30 custodian subpoenaed may, in lieu of personal appearance, tender to the
31 court in which the action is pending by registered or certified mail or by
32 personal delivery, on or before the time specified in the subpoena, certified
33 copies of the records requested together with a copy of the subpoena and an
34 affidavit by the custodian testifying that the copies are true and correct
35 copies and that the records were made and kept in the regular course of
36 business, or if no such records are in the custodian's custody, an affidavit to
37 that effect. When the copies of records are personally delivered under this
38 subdivision, a receipt shall be obtained from the person receiving the
39 records. Any original or certified copy of records or an affidavit delivered
40 according to the provisions of this subdivision, unless otherwise
41 objectionable, shall be admissible in any action or proceeding without
42 further certification or authentication. Copies of hospital medical records
43 tendered under this subdivision shall not be open to inspection or copied by
44 any person, except to the parties to the case or proceedings and their
45 attorneys in depositions, until ordered published by the judge at the time of
46 the hearing or trial. Nothing contained herein shall be construed to waive the
47 physician-patient privilege or to require any privileged communication under
48 law to be disclosed.
- 49 (3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a
50 person commanded to appear at a deposition or to produce and permit the
51 inspection and copying of ~~records~~ records, books, papers, documents,

1 electronically stored information, or tangible things may, within 10 days
2 after service of the subpoena or before the time specified for compliance if
3 the time is less than 10 days after service, serve upon the party or the
4 attorney designated in the subpoena written objection to the subpoena,
5 setting forth the specific grounds for the objection. The written objection
6 shall comply with the requirements of Rule 11. Each of the following
7 grounds may be sufficient for objecting to a subpoena:

- 8 a. The subpoena fails to allow reasonable time for compliance.
- 9 b. The subpoena requires disclosure of privileged or other protected
10 matter and no exception or waiver applies to the privilege or
11 protection.
- 12 c. The subpoena subjects a person to an undue ~~burden~~burden or
13 expense.
- 14 d. The subpoena is otherwise unreasonable or oppressive.
- 15 e. The subpoena is procedurally defective.

16 (4) Order of court required to override objection. – If objection is made under
17 subdivision (3) of this subsection, the party serving the subpoena shall not be
18 entitled to compel the subpoenaed person's appearance at a deposition or to
19 inspect and copy materials to which an objection has been made except
20 pursuant to an order of the court. If objection is made, the party serving the
21 subpoena may, upon notice to the subpoenaed person, move at any time for
22 an order to compel the subpoenaed person's appearance at the deposition or
23 the production of the materials designated in the subpoena. The motion shall
24 be filed in the court in the county in which the deposition or production of
25 materials is to occur.

26 (5) Motion to quash or modify subpoena. – A person commanded to appear at a
27 trial, hearing, deposition, or to produce and permit the inspection and
28 copying of records, books, papers, documents, electronically stored
29 information, or other tangible things, within 10 days after service of the
30 subpoena or before the time specified for compliance if the time is less than
31 10 days after service, may file a motion to quash or modify the subpoena.
32 The court shall quash or modify the subpoena if the subpoenaed person
33 demonstrates the existence of any of the reasons set forth in subdivision (3)
34 of this subsection. The motion shall be filed in the court in the county in
35 which the trial, hearing, deposition, or production of materials is to occur.

36 (6) Order to compel; expenses to comply with subpoena. – When a court enters
37 an order compelling a deposition or the production of records, books, papers,
38 documents, electronically stored information, or other tangible things, the
39 order shall protect any person who is not a party or an agent of a party from
40 significant expense resulting from complying with the subpoena. The court
41 may order that the person to whom the subpoena is addressed will be
42 reasonably compensated for the cost of producing the records, books, papers,
43 documents, electronically stored information, or tangible things specified in
44 the subpoena.

45 (7) Trade secrets; confidential information. – When a subpoena requires
46 disclosure of a trade secret or other confidential research, development, or
47 commercial information, a court may, to protect a person subject to or
48 affected by the subpoena, quash or modify the subpoena, or when the party
49 on whose behalf the subpoena is issued shows a substantial need for the
50 testimony or material that cannot otherwise be met without undue hardship,

- 1 the court may order a person to make an appearance or produce the materials
2 only on specified conditions stated in the order.
- 3 (8) Order to quash; expenses. – When a court enters an order quashing or
4 modifying the subpoena, the court may order the party on whose behalf the
5 subpoena is issued to pay all or part of the subpoenaed person's reasonable
6 expenses including attorney's fees.
- 7 (d) Duties in Responding to Subpoenas. –
- 8 (1) Form of response. – A person responding to a subpoena to produce
9 ~~documents~~ records, books, documents, electronically stored information, or
10 tangible things shall produce them as they are kept in the usual course of
11 business or shall organize and label ~~the documents~~ them to correspond with
12 the categories in the request.
- 13 (2) Form of producing electronically stored information not specified. – If a
14 subpoena does not specify a form for producing electronically stored
15 information, the person responding must produce it in a form or forms in
16 which it ordinarily is maintained or in a reasonably useable form or forms.
- 17 (3) Electronically stored information in only one form. – The person responding
18 need not produce the same electronically stored information in more than
19 one form.
- 20 (4) Inaccessible electronically stored information. – The person responding need
21 not provide discovery of electronically stored information from sources that
22 the person identifies as not reasonably accessible because of undue burden
23 or cost. On motion to compel discovery or for a protective order, the person
24 responding must show that the information is not reasonably accessible
25 because of undue burden or cost. If that showing is made, the court may
26 nonetheless order discovery from such sources if the requesting party shows
27 good cause, after considering the limitations of Rule 26(b)(2). The court may
28 specify conditions for discovery, including requiring the party that seeks
29 discovery from a nonparty to bear the costs of locating, preserving,
30 collecting, and producing the electronically stored information involved.
- 31 (2)(5) Specificity of objection. – When information subject to a subpoena is
32 withheld on the objection that it is subject to protection as trial preparation
33 materials, or that it is otherwise privileged, the objection shall be made with
34 specificity and shall be supported by a description of the nature of the
35 communications, records, books, papers, documents, electronically stored
36 information, or other tangible things not produced, sufficient for the
37 requesting party to contest the objection.
- 38 (d1) Opportunity for Inspection of Subpoenaed Material. – A party or attorney
39 responsible for the issuance and service of a subpoena shall, within five business days after the
40 receipt of material produced in compliance with the subpoena, serve all other parties with
41 notice of receipt of the material produced in compliance with the subpoena and, upon request,
42 shall provide all other parties a reasonable opportunity to copy and inspect such material at the
43 expense of the inspecting party.
- 44 (e) Contempt; Expenses to Force Compliance With Subpoena. –
- 45 (1) Failure by any person without adequate excuse to obey a subpoena served
46 upon the person may be deemed a contempt of court. Failure by any party
47 without adequate cause to obey a subpoena served upon the party shall also
48 subject the party to the sanctions provided in Rule 37(d).
- 49 (2) The court may award costs and attorney's fees to the party who issued a
50 subpoena if the court determines that a person objected to the subpoena or
51 filed a motion to quash or modify the subpoena, and the objection or motion

1 was unreasonable or was made for improper purposes such as unnecessary
2 delay."

3 **SECTION 7.** The Revisor of Statutes shall cause to be printed, as annotations to
4 the published General Statutes, all explanatory comments of the drafters of this act, the North
5 Carolina Bar Association Litigation Section E-Discovery Committee, as the Revisor may deem
6 appropriate.

7 **SECTION 8.** This act becomes effective October 1, 2011, and shall apply to
8 actions filed on or after that date.