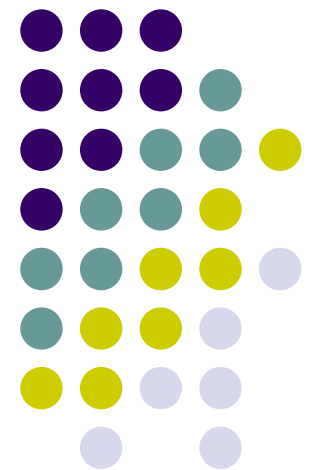
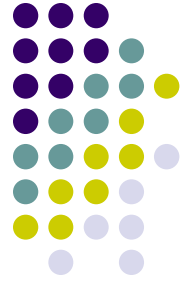


The New E-discovery Rules

What difference do they make?



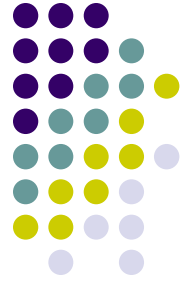


New Rules

- New Federal Rules of Civil Procedure – take effect December 1, 2006.
- New N.C. Business Court Rules – already in effect as of July 31, 2006.
- No other N.C. state court rules yet, but in practice may follow lead of federal courts and Business Court.

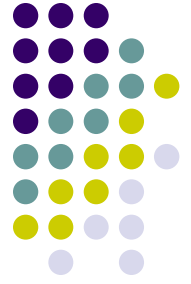


Key Changes In New Rules



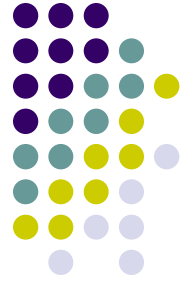
Overview of Key Changes

- Discussion of document preservation and electronic discovery at discovery plan conference. (FRCP 26(f) and BCR 17.1)
- Requirements regarding form of production. (FRCP 34(b))
- Two-tier classification system for electronically stored information. (FRCP 26(b)(2)(B))



Discovery Plan Conference

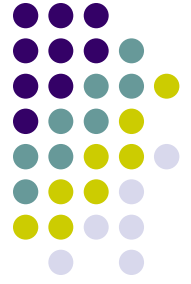
- New FRCP 26(f) requires discussion at discovery plan conference of:
 - “any issues relating to preserving discoverable information.”
 - “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”



Discovery Plan (cont.)

- New BCR 17.1 – far more detailed than FRCP regarding discussion at case management conference.
- BCR 17.1 requires discussion of:
 - Managing of discovery costs, including form of production.
 - Document preservation, including:
 - “the need to suspend all automatic deletions of electronic documents or overwriting of backup tapes which may contain potentially relevant information”
 - “the need for a document preservation order”





New BCR 17.1 (cont.)

- Cost-shifting for electronic discovery.
- Form of production generally.
- Whether metadata is to be produced, and if so how.
- Confidentiality procedures in connection with electronically produced information (including client access).
- Same issues may come up in federal discovery plan.



Form of Production

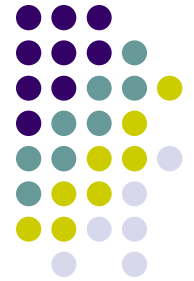
- FRCP 34(b):
 - Discovery requests “may specify the form or forms in which electronically stored information is to be produced.”
 - Responding party can object to requested form, but must state reasons for the objection.
 - If form not specified in request, information must be produced:
 - In the form “in which it is ordinarily maintained,” or
 - In a form that is “reasonably usable.”



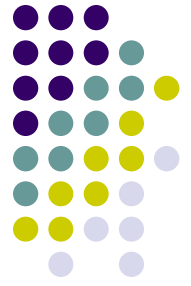
Two-Tier Classification System



- FRCP 26(b)(2)(B):
 - “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”
 - If challenged, “the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.”
 - “If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause The court may specify conditions for the discovery.”



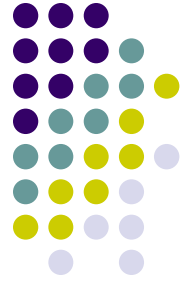
Effects of New Rules



Litigation Holds

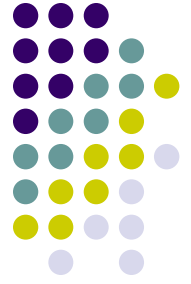
- At Rule 26(f) conference, need to describe and defend what you've done at outset of dispute.
- Once litigation is reasonably foreseeable, parties have a duty to preserve relevant documents.
 - Sources of duty include: common law of spoliation, N.C. Rule of Professional Conduct 3.4(a), N.C. R. Civ. P. 37.
 - Duty to preserve evidence “arises when the party in possession of the evidence is on notice that the evidence may be relevant to future litigation.” Praxair, Inc. v. Airgas, Inc., 2000 NCBC 10 at 69. This can, and often does, happen before a complaint is filed.





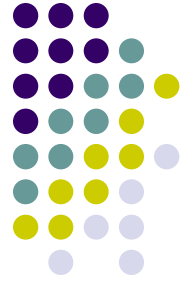
Preserving Electronic Data

- There's a lot out there.
 - Different types of data.
 - Different sources of data.
- Special challenges of electronic data.
 - Common for electronic data to be routinely deleted.
 - In certain cases, merely printing a document or saving it to a disk may not be sufficient.



What to Preserve

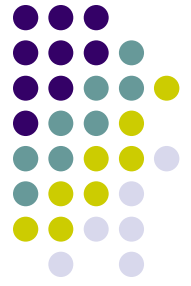
- Factors to consider:
 - Allegations and defenses in the case.
 - Key actors and events.
 - Nature of claim.
 - Overlap among data sources.
 - Cost of preservation – both monetary and in terms of disruption to operations.
 - Just because you preserve something does not mean you have to produce it later.



Litigation Hold Notice

- Once scope of preservation duty decided, issue a litigation hold.
 - Should be in writing and specific.
 - Should be properly tailored.
 - Should go to right audience.
- Will require follow up initially and as litigation progresses.
- Release litigation hold when litigation is concluded.

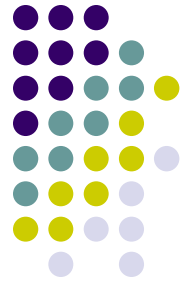
Document Retention Policies



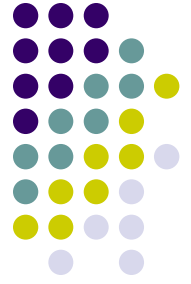
- Determine the lay of the land at time of litigation hold.
- Keep what you need and don't keep what you don't need.
- Should cover all types and sources of data.
- Should be designed with need for litigation holds in mind.
 - Need to be able to identify and isolate documents for X personnel on Y topics during Z time frame.
- Particular issues in litigation.



Document Retention Policies



- FRCP 37(f): “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”



Depositions of IT Personnel

- Reasonableness and implementation of litigation hold.
- Rule 26(f) – Litigating whether data is “inaccessible.”
- Useful to have single person identified as 30(b)(6) witness on information technology and document retention issues.