



ILLINOIS STATE BAR ASSOCIATION

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E-discovery update: Guidelines for Delaware Chancery Courts

By George S. Bellas

Delaware has become one of the first states to adopt guidelines for e-discovery. (<http://courts.delaware.gov/forms/download.aspx?id=50988>) However, since the Delaware Chancery Court is where most business litigation takes place, the Guidelines are instructive. Although basic as compared to the more detailed 7th Circuit E-Discovery Principles, the message is clear. Parties are expected to collaborate and cooperate on issues relating to ESI.

The Guidelines can also serve as a strong recommendation to everyone litigating any business case in the state courts. The Guidelines are set forth in full below.

COURT OF CHANCERY GUIDELINES FOR PRESERVATION OF ELECTRONICALLY STORED INFORMATION

The purpose of these guidelines is to remind all counsel (including Delaware counsel) appearing in any case before this Court of their common law duty to their clients and the Court with respect to the preservation of electronically stored information ("ESI") in litigation.¹ A party to litigation must take reasonable steps to preserve information, including ESI, that is potentially relevant to the litigation and that is within the party's possession, custody or control. ESI takes many forms and may be lost or deleted absent affirmative steps to preserve it. As set forth below, at the very minimum that means that parties and their counsel must develop and oversee a preservation process. Such a process should include the dissemination of a litigation hold notice to custodians of potentially relevant ESI.

Counsel oversight of identification and

preservation processes is very important and the adequacy of each process will be evaluated on a case-by-case basis. Once litigation has commenced, if a litigation hold notice has not already been disseminated, counsel should instruct their clients to take reasonable steps to act in good faith and with a sense of urgency to avoid the loss, corruption or deletion of potentially relevant ESI. Failing to take reasonable steps to preserve ESI may result in serious consequences for a party or its counsel.

What steps will be considered to be reasonable will vary from litigation to litigation. In most cases, however, a party and its counsel (in-house and outside) should:

- Take a collaborative approach to the identification, location and preservation of potentially relevant ESI by specifically including in the discussion regarding the preservation processes an appropriate representative from the party's information technology function (if applicable);
- Develop written instructions for the preservation of ESI and distribute those instructions (as well as any updated, amended or modified instructions) in the form of a litigation hold notice to the custodians of potentially relevant ESI; and
- Document the steps taken to prevent the destruction of potentially relevant ESI.

Parties are expected to collaborate and cooperate on issues relating to ESI.

Experience has shown that some of the potential problem areas regarding preservation of ESI include business laptop computers, home computers (desktops and laptops), external or portable storage devices such as USB flash drives (also known as "thumb drives or key drives") and personal e-mail accounts. While this list is not exhaustive, it is meant to be a starting point for parties and their counsel in considering how and where their clients and their employees might store or retain potentially relevant ESI. Counsel and their clients should discuss the need to identify how custodians store their information, including document retention policies and procedures as well as the processes administrative or other personnel might use to create, edit, send, receive, store and destroy information for the custodians. Counsel also should take reasonable steps to verify information they receive about how ESI is created, modified, stored or destroyed.

While the development and implementation of a preservation process after litigation has commenced may not be sufficient by itself to avoid the imposition of sanctions by the Court if potentially relevant ESI is lost or destroyed, the Court will consider the good-faith preservation efforts of a party and its counsel. Counsel are reminded, however, that the duty to preserve potentially relevant ESI is triggered when litigation is commenced or when litigation is "reasonably anticipated," which could occur before litigation is filed.

Parties and their counsel can agree with opposing parties and their counsel to limit or forgo the discovery of ESI. Whether or not parties enter into such an agreement,

however, it is beneficial for parties and their counsel to confer regarding the preservation of ESI early in the litigation. It is also recommended that after preservation has been addressed, counsel for all parties confer about the scope and timing of discovery of ESI. ■

George Bellas is the Senior Partner in the Park Ridge law firm of Bellas & Wachowski, has served as a panelist at the Sedonna Conference, and currently serves on the 7th Circuit E-Discovery Com-

mittee.

1. These guidelines focus narrowly on the preservation of ESI, an area where problems are often difficult to remedy after the fact. The Court of Chancery Rules Committee is continuing to monitor the broader topic of discovery of ESI and has not yet proposed any specific rules or guidelines as to electronic discovery in general. To date, the Court of Chancery has not adopted a comprehensive set of rules or guidelines regarding the discovery of ESI. Extensive resources on that topic

are available, however, from many sources. Without endorsing or commenting on the merits of these or any other specific resources, examples of such resources include but are not limited to "The Sedona Guidelines: Best Practices & Commentary for Managing Electronic Information in the Electronic Age," <<http://www.thesedonaconference.org/dltForm?did=Guidelines.pdf>> (last visited July 27, 2010), and the "Conference of Chief Justices: Guidelines for State Trial Courts regarding Discovery of Electronically-Stored Information," dated August 6, 2006.

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