

Chancery Provides Framework for ESI Discovery, Preservation



Gareth Evans
Delaware Business Court Insider

As one of the principal courts handling complex business litigation, the Delaware Court of Chancery sees more than its fair share of matters involving large volumes of electronically stored information (ESI) and the inherent challenges in dealing with it.

Following a series of decisions involving electronic discovery issues in 2009, some of which imposed spoliation sanctions, the Chancery Court in 2011 issued preservation guidelines and this year issued guidelines regarding the collection and review of ESI.

The guidelines provide a helpful framework and also pointed out guidance on practices that the court encourages, as well as those that it discourages. Of particular note, the guidelines emphasize counsel's over-

sight duties in preservation and collection, including the role of Delaware counsel, and expressly identify best practices that parties and their counsel (both in-house and outside) should follow.

Counsel Responsible for Legal Hold

The guidelines emphasize that the responsibility for preservation of electronically stored information lies not just with the parties, but also with their counsel. They remind counsel that the duty to preserve is triggered when litigation is reasonably anticipated, which could occur before litigation is filed. They state that "at the very minimum," both "parties and their counsel" are responsible for developing and overseeing the preservation process, and they emphasize that counsel's oversight of that process "is very important."

Lest there be any doubt about the importance of properly implementing a legal hold, the guidelines state that failing to take reasonable steps "may result in serious consequences for a party or its counsel."

Reasonable Preservation Process

The guidelines also describe at a high level some of the features of a reasonable preservation process.

They state that a party and its counsel (both inside and outside) should take a collaborative approach to the identification, location and

preservation of potentially relevant ESI, including discussions with an appropriate person in the party's information technology department.

Additionally, the guidelines provide that the party and its counsel should develop written preservation instructions and distribute them in the form of a litigation hold notice to the custodians of potentially relevant ESI. They state that once litigation has commenced, if a litigation hold has not already been issued, counsel should instruct their clients not only to take reasonable steps, in good faith, to preserve potentially relevant ESI, but also to do so "with a sense of urgency." Furthermore, the guidelines state that the party and its counsel should document the steps taken to prevent the destruction of potentially relevant ESI.

The guidelines flag several sources that experience has shown are "potential problem areas" and that should be considered a "starting point" for parties and their counsel in determining potential sources of relevant ESI. These sources include home computers, tablets and mobile devices, external or portable storage devices such as USB flash drives (also known as thumb drives) and personal email accounts.

The guidelines further provide that counsel and their clients should discuss how custodians store their information, applicable document reten-

tion policies or procedures, and the processes administrative personnel use to create, edit, send, receive, store and destroy information for custodians. They also state that counsel should take reasonable steps to verify that the information they receive is correct.

Communication and Transparency With Opponents Encouraged

After discovery commences, the guidelines encourage counsel for both sides to meet and confer promptly to develop a discovery plan. They state that transparency about the collection process—including the identity of custodians, cutoff dates and search terms (if any) used in collection—is “essential” to identify potential areas of disagreement early and to provide some protection if problems later arise. As to the latter point, the guidelines suggest that to the extent that details about the collection process are disclosed and other parties do not object, that fact “may be relevant” when the court addresses later discovery disputes.

Discussion of Proportionality is Mandatory

The guidelines expressly recognize that “in order for litigation to produce justice, the costs of the litigation must be proportionate to what is at stake” and that this principle “applies with special force to the subject of electronic discovery.”

The Chancery Court has declined to adopt specific requirements about the extent of electronic discovery, because what is appropriate is usually very case-specific. Consequently, the guidelines provide that it “is essential and not optional” that the parties discuss proportionality directly.

The guidelines exhort the parties to “apply common-sense judgment,” especially when one party in a case has virtually no discovery burden (as

in most class action and shareholder derivative litigation).

Self-Collection Discouraged

Companies often prefer that their own IT staff collect electronically stored information off of their systems for use in litigation, but the practice is controversial. The Chancery Court in its guidelines discourages it.

The guidelines note that when interested people collect or review their own documents for purposes of production, the reliability of the process is more likely to be questioned. They also note that ESI is susceptible to modification or deletion during collection—e.g., especially where parties do not use forensically sound tools and processes that properly extract ESI for litigation purposes without modifying the documents or their metadata.

Consequently, the guidelines pointedly state that the court prefers, as a general matter and whenever practicable, that outside counsel or professionals acting under their review—i.e., an e-discovery service provider—conduct document collection rather than the party itself.

Collection Interviews Encouraged

Interviews of custodians to determine the potential locations of responsive documents are generally considered a best practice. The guidelines state that they should be among the procedures used to collect documents. They also flag that the interviews should cover not only the custodian’s files, but also the files and computers of administrative or other personnel who prepare, send, receive or store documents on behalf of custodians.

Overdesignation on Privilege Logs Discouraged

The guidelines identify overdesignation as a common problem with

privilege logs. They provide that senior lawyers, especially Delaware lawyers, must provide guidance about Delaware standards for asserting privileges, including what must be set forth on privilege logs, and protocols for identifying potentially privileged documents and ensuring that Delaware standards are applied. They also provide that senior lawyers, including senior Delaware counsel, should make the final decisions on difficult privilege questions and should ensure there is no systematic overdesignation (for example, through sampling log entries).

Role of Delaware Counsel Generally

Finally, the guidelines state that the Chancery Court expects Delaware counsel to play an active role in the discovery process. In particular, Delaware counsel should, at a minimum, discuss with co-counsel the court’s expectations. They should also be involved in making important decisions about the collection and review of documents. And they should receive regular updates, “preferably in writing,” regarding the decisions that are made on key issues, such as the selection of custodians and search terms.

Indeed, the guidelines recommend that co-counsel and Delaware counsel jointly maintain a written description of the entire preservation and collection process.

Gareth Evans is a partner at Gibson, Dunn & Crutcher. His practice focuses on complex business litigation, information technology and data privacy, and electronic discovery.