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Court of Chancery Publishes Guidelines
For Preservation of Electronically Stored Information

Consistent with its increasing scrutiny of electronic discovery practices, the Court of Chancery published guidelines on January 18, 2011, for the preservation of electronically stored information (“ESI”). This is an important topic for Delaware corporate litigants because the use of and reliance upon electronic communication media has grown exponentially. Moreover, unlike physical paper documents, ESI may be lost or deleted absent affirmative preservation steps. Although the Court of Chancery has not yet adopted a comprehensive set of rules, the guidelines provide a general framework in which companies and practitioners should operate.

Delaware law requires that a party to litigation take reasonable steps to preserve information, including ESI, that is potentially relevant and within the party’s possession, custody or control. The obligation to preserve ESI ripens when litigation is either commenced or “reasonably anticipated.” At a minimum, “reasonable steps” requires parties and their counsel actively to develop and oversee a preservation process. In establishing this process, the guidelines suggest the following:

1. Including a representative from the party’s information technology function in taking a collaborative approach to identifying, locating and preserving potentially relevant ESI.
2. Developing and disseminating a litigation hold notice (written instructions for the preservation of ESI) to custodians of potentially relevant ESI.

3. Documenting the steps taken to prevent the destruction of potentially relevant ESI.

Limiting preservation of ESI to information stored on office servers and hard drives is insufficient. Other sources that must be searched include business laptop computers, home computers (desktop and laptops), external or portable storage devices such as USB flash drives (also known as “thumb drives or key drives”) and personal email accounts. The list is not exhaustive. The numerous methods of electronic storage reinforce the importance of counsel discussing with their clients at the earliest possible stage how custodians store their information.

Unlike the Delaware Superior Court, the Court of Chancery does not mandate “meet and confers.” The guidelines, however, advise that counsel for all parties should confer early in the litigation regarding the preservation of ESI and again later regarding the scope and timing of discovery of ESI. Such meet and confers not only protect the interests of the parties in safeguarding ESI but also ensure a more streamlined and efficient electronic discovery process.

Furthermore, it is imperative for counsel, not the client, to play the lead role in review and production of electronic discovery. Some Chancery decisions state that clients should not be left with the responsibility of performing a relevancy review because of potential incentive problems.¹ Permitting a client to do so may draw sharp criticism from the Court.²

Publication of these guidelines signal that issues involving electronic discovery are on the Court’s radar. Companies and their counsel are well advised to plan to comply with these guidelines. Although minimum compliance will not necessarily shield a party or its counsel from sanctions in every case that documents are lost, good-faith preservation efforts will be a material consideration by the Court in any ESI discovery dispute.

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¹ See e.g. *Roffe v. Eagle Rock Energy, GP, L.P.*, C.A. No. 5258-VCL, Tr. at 9-14 (April 8, 2010).

² *Id.*