

Delaware Court of Chancery Adopts ESI Preservation Guidelines

By Thomas A. Lidbury and Andrea L. D'Ambra

The Delaware Court of Chancery recently joined a growing number of jurisdictions in the adoption of guidelines that concern the discovery of electronically stored information (commonly referred to as "ESI"). The guidelines are narrowly limited to the preservation of ESI, other than one sentence which "recommend[s] that after preservation has been addressed, counsel for all parties confer about the scope and timing of discovery of ESI." More guidance may be forthcoming as the guidelines note that the "Court of Chancery Rules Committee is continuing to monitor the broader topic of discovery of ESI." While that review is under way, the guidelines refer the reader to other sources of guidance on the broader topics, "[w]ithout endorsing or commenting on the merits of these or any other specific resources." The two non-endorsed examples given are *The Sedona Guidelines: Best Practices & Commentary for Managing Electronic Information in the Electronic Age* and the *Conference of Chief Justices: Guidelines for State Trial Courts regarding Discovery of Electronically-Stored Information*.

The Court of Chancery's preservation guidelines are intended to "remind" counsel of their common law duty "to their clients and the Court" with respect to the preservation of ESI. The guidelines adopt a reasonableness standard and avoid setting absolute requirements by noting that "[w]hat steps will be considered to be reasonable will vary from litigation to litigation." The Court, however, sets forth certain steps that ordinarily "should" be undertaken in most cases.

Among the Court's ordinary expectations is that counsel will be actively involved in their clients' efforts to preserve ESI. The guidelines state that "[c]ounsel oversight of identification and preservation processes is very important. Counsel should determine if their clients have implemented a reasonable legal hold and, if not, "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." Counsel and their clients 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)." ... "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.”

The guidelines list “potential problem areas” for preservation, including business laptops, home computers, USB or thumb drives and personal email accounts, which is meant as a “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.” The guidelines warn that failures of a client to reasonably preserve ESI “may result in serious consequences for a party or its counsel” (emphasis added).

The guidelines adopt the view that, ordinarily, a written legal hold notice should be issued “to the custodians of potentially relevant ESI.” The guidelines’ incorporation of a safety valve, noting that what is reasonable may vary from case to case, avoids the absolutist approach taken by Judge Scheindlin in the recent *Pension Committee* case. But the use of the phrase “potentially relevant” will likely add to the ongoing confusion as to the proper scope of preservation. It seems improbable that a party or its counsel will ever be sanctioned for not preserving ESI that was “potentially relevant” but was not actually relevant and discoverable. Of course, parties and counsel will often err on the side of caution in close calls on the scope of preservation because they cannot predict in advance precisely where the discovery line will be drawn. Expressing the duty to preserve as encompassing the “potentially” relevant may, however, lead to excessive preservation efforts that go beyond what is reasonable and proportionate to the needs of the case.

The guidelines state that parties and counsel should document the steps taken to preserve ESI. The guidelines do not explain the reason; presumably, it is so that reasonable preservation efforts are not forgotten or hard to reconstruct by the time a problem arises and a challenge is made.

The Federal Rules of Civil Procedure require opposing parties to discuss “any issues about disclosure or discovery of” ESI. Fed. R. Civ. P. 26(f)(3)(c). The Delaware Court of Chancery guidelines encourage, without requiring, opposing parties and counsel to “to confer regarding the preservation of ESI early in the litigation.” The guidelines also allow that “parties and their counsel can agree with opposing parties and their counsel to limit or forgo the discovery of ESI.” It can be helpful at an early stage of a case to raise and resolve, by agreement if possible or Court order if necessary, basic issues concerning preservation of ESI, such as a party’s intention to continue recycling backup tapes and to not forensically image hard full drives. Raising these issues early ensures that any dispute about such steps will be resolved before it becomes a spoliation issue, and based on the information available at the time the decision needs to be made rather than with the benefit of hindsight after a problem has surfaced.

Finally, the guidelines remind parties that the duty to preserve attaches when litigation is reasonably anticipated—often well before the complaint is filed. The guidelines provide that undertaking preservation steps after a case is 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.” The guidelines do not explain how such belated efforts will be weighed, but they seem to encourage parties and counsel not to give up just because they may be getting a late start at preservation of ESI.

The Court of Chancery’s guidelines place significant expectations on parties, and on their counsel, in “most cases.” These guidelines reinforce the need for companies who regularly engage in litigation to develop a reasonable process for preserving ESI when litigation looms. The guidelines also place expectations on inside and outside counsel to adequately inform and involve themselves in the process of preserving ESI. The guidelines can be reviewed in their entirety at: <http://courts.delaware.gov/forms/download.aspx?id=50988>

For further information, please contact Thomas Lidbury at Thomas.Lidbury@dbr.com or (312) 569-1356 or Andrea D’Ambra at Andrea.DAmbra@dbr.com or (215) 988-2636 or your regular Drinker Biddle contact.

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Thomas A. Lidbury
Chicago
(312) 569-1356
Thomas.Lidbury@dbr.com

Todd C. Schiltz
Wilmington
(302) 467-4225
Todd.Schiltz@dbr.com

Andrea L. D’Ambra
Philadelphia
(215) 988-2636
Andrea.DAmbra@dbr.com

Joseph C. Schoell
Wilmington
(302) 467-4245
Joseph.Schoell@dbr.com

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